93-830

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

DAVIS SUPERMARKETS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

STUART A. WILLIAMS
Counsel of Record
ECKERT SEAMANS CHERIN
& MELLOTT
Attorneys for Petitioner
600 Grant Street
42nd Floor
Pittsburgh, Pennsylvania 15219
(412) 566-5946

4495
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the Board's conclusion that Petitioner violated Section 8(a)(1) of the National Labor Relations Act based upon the continued prosecution of state court trespass litigation after the issuance of a complaint by the General Counsel based upon an employer's denial of access to its property is a permissible interpretation of the Act in light of this Court's opinions in *Bill Johnson's Restaurants, Inc. v. NLRB*, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, and *International Longshoremen's Association, AFL-CIO v. Davis*?

2. What actions by an employer constitute a discriminatory denial of access sufficient to defeat an employer's otherwise available right to restrict picketers from access to its property to communicate with the customers of the employer?

3. Whether dual function employees who work a substantial period of time in a unit and so have a valid interest in the terms and conditions of employment in that unit should be denied a voice in the selection of the bargaining representative for that unit based solely upon the fact that the employees were represented by a different union while performing work in a separate bargaining unit in a separate retail facility operated by the same employer?

LIST OF PARTIES

The parties to the proceeding below were Davis Supermarkets, Inc., petitioner herein ("Petitioner"); the National Labor Relations Board, respondent herein ("NLRB" or "Board"); and the United Food and Commercial Workers International Union, Local Union 23, AFL-CIO-CLC ("Local 23"), intervenor below.

Pursuant to Rule 29.1, Davis Supermarkets, Inc., states that it has no parent company or subsidiary. J. A. Davis, Inc. is an affiliated corporation, operating a grocery store in Greensburg, Pennsylvania.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 2 F.3d 1162 (D.C. Cir. 1993), and is reprinted in the appendix. *See* p. 1a.

The Decision and Order of the National Labor Relations Board is reported at 306 N.L.R.B. No. 86 (1992), and is reprinted in the appendix. *See* pp. 37a *et seq.*

STATEMENT OF JURISDICTION

Upon charges filed with the NLRB by Local 23, complaints issued against Petitioner. The complaints, as amended, alleged that Petitioner engaged in unfair labor practices within the meaning of Sections 8(a)(1), (2), (3) and (5) of the Act. On March 28, 1990, the Administrative Law Judge ("ALJ") issued his decision, finding that Petitioner had committed violations of the Act and issuing a bargaining order. On or about April 25, 1990, Petitioner filed exceptions to the findings of the ALJ. By Decision and Order dated February 27, 1992, the NLRB affirmed the ALJ in all material respects.

Petitioner filed a Petition for Review on April 1, 1992 pursuant to 29 U.S.C. § 160(f). Respondent filed a cross-application for enforcement of the Order of the National Labor Relations Board pursuant to 29 U.S.C. § 160(e). By Opinion dated August 27, 1993, the United States Court of Appeals for the District of Columbia Circuit upheld "all of the Board's findings of unfair labor practices and its issuance of a bargaining order," remanding "only so that the Board, for purposes of continuing representation, [could] determine the unit placement of [certain employees] whose status the Board did not previously determine . . . ." *See* appendix, p. 36a, *infra.* No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

This Petition implicates the National Labor Relations Act, 29 U.S.C. § 151(a), *et seq.*, as amended, and the related regulations of the National Labor Relations Board, relevant portions of which are set forth below:

Relevant portions of the National Labor Relations Act, as amended (29 U.S.C. § 151 *et seq.*) are as follows:

Statutory Provisions

Section 2 (29 U.S.C.§152):

When used in this Act-

* * *

(3) The term "employee" shall include any employee, *** and shall include any individual whose work has ceased *** because of any unfair labor practice, ***.

* * *

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

Section 8(a) (29 U.S.C. § 158(a)):

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it: * * *;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title.

Section 9(a) (29 U.S.C. § 159(a)):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

Section 10(e), (f), (j) (29 U.S.C. § 160(e), (f), (j)):

> (e) The Board shall have power to petition any court of appeals of the United States, *** within any circuit *** wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order ***. Upon the filing of such petition, the court *** shall have power *** to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged

before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the

Board; the finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Regulations

Section 101.8 (29 C.F.R. § 101.8):

If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the Regional Director institutes formal action by issuance of a complaint and notice of hearing. In certain types of case, involving novel and complex issues, the Regional Director, at the discretion

of the General Counsel, must submit the case for advice from the General Counsel before issuing a complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 14 days of its receipt, setting forth a statement of its defense.

Section 102.15 (29 C.F.R. § 102.15):

After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all the other parties a formal complaint in the name of the Board stating the unfair labor practice and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 14 days after the service of the complaint. The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places and such acts and the names of respondent's agents or other representatives by whom committed.

STATEMENT OF THE CASE

Davis Supermarkets ("Petitioner"), a family-owned corporation engaged in the retail grocery business, owns and operates a supermarket in Greensburg, Pennsylvania, and a supermarket in Hempfield Township, Pennsylvania. The Greensburg store has been open for approximately thirty years. The United Steelworkers of America ("Steelworkers") has represented the Greensburg employees throughout the period relevant to this case. The Hempfield store opened in 1984. When the events giving rise to this case commenced in 1986, the Hempfield employees were unrepresented. (3a).[1] Since 1981, James Davis has served as Petitioner's President. James Davis' duties include overall responsibility for all locations. Each location is or was separately supervised. Each department operates independently under the direction of a department manager. (D.A. 733, 750, 753).

From the opening of the Hempfield store, Petitioner transferred full and regular part-time employees between stores in order to ensure uniformity in operations. Employees regularly worked at both the Greensburg and Hempfield supermarkets in the deli department (D.A. 657, 666, 720); the meat/seafood department (D.A. 720); the bakery department (D.A. 680-84); the "front end" area of the store, which included cashiers, baggers and customer service employees (D.A. 655); general merchandise and health and beauty aids (D.A. 715, 724); grocery price coordination (D.A. 716, 725); transportation (D.A. 672); and maintenance. (D.A. 665); *see generally* (D.A. 260-62; 394-400).

In early May 1986, Petitioner received a copy of the petition

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1. References to the appendix filed with this Petition are designated as (__a). References to the Deferred Appendix filed with the Court of Appeals for the District of Columbia Circuit on March 24, 1993 are designated as (D.A. __).

filed by Local 23 seeking an election for employees at Hempfield. Subsequent to Local 23's filing of the petition, but prior to the time the Regional Director set a date for the election, Local 23 engaged in picketing at Hempfield. On May 23, 1993, approximately 12 individuals appeared at the Hempfield store and engaged in conduct including blocking customer ingress and egress to the supermarket (D.A. 694; 699; 735-37), intimidating customers and employees, leading at least one customer to express concern for his safety and that of his automobile (D.A. 703-04, 751), using profane language and making threats and obscene gestures (D.A. 694, 705, 735-37), and littering the supermarket premises (D.A. 735-37).

On May 23, 1986 Petitioner filed a civil trespass suit in state court against the pickets and, on May 28, acquired an injunction enjoining Local 23 from entering the store grounds and limiting pickets to three at each parking lot entrance. (D.A. 342-54). Notwithstanding the injunctions, Local 23 and Petitioner agreed to permit Local 23 greater access to the property than that provided in the injunction. (D.A. 352-53). Nevertheless, on June 2, Local 23 filed a charge with the Board, alleging that Petitioner had unlawfully prevented picketing in the parking lot. (4a). By letter dated July 22, 1986, Local 23 requested cancellation of the election scheduled to be held on July 25, 1986, which request was granted. (4a). On July 25, the NLRB's General Counsel issued a complaint alleging that Petitioner had violated Section 8(a)(1) by denying Local 23 access to the premises and by maintaining the civil trespass suit. (4a-5a).

In late July, Local 23 resumed picketing, and some pickets distributed handbills to customers in the parking lot. On August 2, a sheriff's deputy presented the pickets with a document indicating that they were not allowed in the parking lot. In late November, a number of laid-off employees of the Hempfield store resumed picketing on the sidewalk in front of the facility. Petitioner then obtained a court order from the state court requiring Local 23 and

the pickets to show cause why they should not be held in contempt for violating the terms of the May 28 injunction. (5a).

Overall, between June 1986 and December 1987, the General Counsel filed four complaints alleging unfair labor practices in violation of NLRA sections 8(a)(1), 8(a)(2), 8(a)(3), and 8(a)(5) of the Act. On March 28, 1990, an Administrative Law Judge ("ALJ") found that Petitioner had violated these sections by (1) firing or constructively firing nine employees for the purpose of discouraging union activity; (2) urging employees to join the Steelworkers and permitting only that union to solicit employees in Petitioner's store; (3) refusing to allow Local 23 to picket or handbill on its property while allowing other organizations access to the store's premises; and (4) continuing to prosecute the state trespass suit after the General Counsel had issued a complaint with respect to the denial of access to Petitioner's property. In addition, the ALJ found that Local 23 represented a majority of employees in a unit consisting of "[a]ll full-time and regular part-time employees employed by [Petitioner] at its Hempfield Township, Pennsylvania, location, excluding confidential employees, students employed pursuant to cooperative education programs and guards, professional employees and supervisors as defined in the Act." The ALJ concluded that a bargaining order was necessary to remedy the unfair labor practices. (5a).

On February 27, 1992, the Board affirmed the ALJ's decision in all major respects. *Davis Supermarkets, Inc.*, 306 N.L.R.B. No. 86 (1992). It concluded that, as of May 24, 1986, Local 23 represented 58 employees out of a unit of 109 employees, rejecting Petitioner's argument that 11 Greensburg employees who performed a substantial amount of work in the Hempfield unit should be given a voice in selecting the representative for the latter unit. The Board's order required Petitioner to cease and desist from the unfair labor practices it was found to have committed and prohibited Petitioner from otherwise violating the employees'

Section 7 rights. In addition, the order required Petitioner, among other things, to offer the nine improperly discharged employees reinstatement; to make them whole for any loss of pay or seniority; to make Local 23 whole for legal expenses incurred in connection with the state court litigation; and, on request, to bargain with Local 23 as the exclusive representative of the employees at the Hempfield store. *See generally* (37a-45a *et seq.*).

Petitioner filed a Petition for Review pursuant to 29 U.S.C. § 160(f). The Court of Appeals for the District of Columbia "uph[e]ld the Board's order in all respects." (2a). The court rejected Petitioner's argument that 11 dual function employees should be included in the Hempfield unit on the basis of its previous opinion in *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991). While the court noted Petitioner's "valid question of whether, in light of [*NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1965)] and [*Lechmere v. NLRB*, 112 S. Ct. 841 (1992)], an employer can ever be required to grant nonemployees access to his property if they seek access to communicate not with employees, but with customers," it nevertheless concluded that Petitioner violated Section 8(a)(1) of the Act by refusing access to employees. Finally, in rejecting the challenge to the Board's finding that Petitioner violated Section 8(a)(1) by continuing to prosecute a state court trespass action following the issuance of a complaint by the General Counsel alleging the unlawful exclusion of employees or union representatives from Petitioner's property, the court accepted as reasonable the rule announced by the Board in *Loehmann's Plaza*, 305 N.L.R.B. No. 81 (1991). All findings of unfair labor practices were upheld by the Court of Appeals. The court remanded the matter "only so that the Board, for purposes of continuing representation, can determine the unit placement of any of six employees whose status the Board did not previously determine who still work at the Hempfield store." The Board did not reach the unit placement of these individuals because their status did not affect the finding that Local 23 represented a

majority of employees in the unit, and the issue of the unit status of these individuals is not raised in the present Petition. *See generally* (22a-23a, 36a).

REASONS FOR GRANTING THE WRIT

I.

The Board's conclusion that Petitioner violated Section 8(a)(1) based upon the continued prosecution of state court litigation after the issuance of a complaint by the General Counsel is inconsistent with this Court's opinions in *Bill Johnson's Restaurants, Inc. v. NLRB, Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* and *International Longshoremen's Association, AFL-CIO v. Davis.*

"A well-established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court . . . ." R. L. Stern, E. Gressman, and S. M. Shapiro, *Supreme Court Practice* (6th ed. 1986). Petitioner respectfully submits that the decision by the Board in the present case, upheld by the Court of Appeals, is inconsistent with this Court's opinions in *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731 (1983), *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180 (1978), and *International Longshoremen's Association, AFL-CIO v. Davis,* 476 U.S. 380 (1986). Specifically, the Board applied its rule prescribed in *Loehmann's Plaza,* 305 N.L.R.B. No. 81 (1991), which announced that, once a complaint issues by the General Counsel alleging an unlawful exclusion of employees or union representatives from an employer's property, any state court lawsuit concerning the question is preempted by the Board's proceedings, and continued maintenance of the lawsuit will violate Section 8(a)(1) and will permit an order for reimbursement of the non-moving party's attorneys' fees. Petitioner submits that this

rule gives insufficient weight to Petitioner's constitutional right to access the state courts.

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Court recognized "that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Id.* at 741 ("The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right"). The Court concluded that a retaliatory motive and lack of a reasonable basis were both prerequisites to the issuance of a cease and desist order requiring withdrawal from pending state court litigation. *Id.* at 740-44. Admittedly, the Court expressly noted that it was not confronted with a suit "claimed to be beyond the jurisdiction of the state courts because of federal-law preemption . . . ." *Id.* at 737-38 n. 5.

Bill Johnson's did not address the issue of when federal law preemption occurs or what entity is empowered to make that determination. These issues were addressed in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), and *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380 (1986). In the former case, the Court considered the issue of "whether the [NLRA], as amended, deprives a state court of the power to entertain an action by an employer attempting to enforce state trespass laws against picketing which is arguably — but not definitely — prohibited or protected by federal labor law." 436 U.S. at 182. The Court rejected a preemption argument, stating as follows:

> As long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error in a state tribunal. In this case the

> Union failed to invoke the jurisdiction of the Labor Board, and Sears had no right to invoke that jurisdiction and could not even precipitate its exercise without resort to self-help. Because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action.

Id. at 207. In a footnote, the Court added the following supplement:

> Not only could the Union have filed an unfair labor practice charge pursuant to 8(a)(1) of the Act at the time Sears demanded that the pickets leave the property, but the Board's jurisdiction could have been invoked and the protection of its remedial powers obtained even after the litigation in the state court had commenced or the state injunction issued.

Id. at 207 n. 43 (citing *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954)). In a concurring opinion, Justice Blackmun argued that "if the union *does* file a 8(a)(1) charge, a state court would be bound to stay any pending injunctive or damages suit brought by the employer until the Board has concluded, or the General Counsel by refusal to issue a complaint has indicated, that the picketing is not protected by § 7." *Id.* at 209 (Blackmun, J., concurring). In response, by separate concurrence, Justice Powell disagreed with the view that state court jurisdiction "is preempted forthwith upon the filing of a charge by the union." *Id.* at 214 (Powell, J., concurring). Justice Powell specifically noted that the Board is free to seek temporary

relief pursuant to Section 10(j) of the Act upon the issuance of a complaint. *Id.* at 214.

Finally, in *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380 (1986), this Court addressed the issue of what showing a party must make in order to demonstrate that conduct is arguably protected or prohibited. In pertinent part, that decision reads as follows:

> The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim, without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board .... The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

Id. at 394-95.

In the present case, the Board found that Petitioner violated Section 8(a)(1) of the Act by maintaining its civil trespass suit against the Union based solely upon the rule announced in *Loehmann's Plaza*. (D.A. 125). In *Loehmann's Plaza*, the Board,

for the first time, announced a rule that, once a Board complaint issues alleging the unlawful exclusion of employees or union representatives from an employer's property, any state court lawsuit concerning the question is preempted by the Board's proceedings, and continued maintenance of the lawsuit will violate Section 8(a)(1). Under *Loehmann's Plaza,* an employer exercising that right will be found to have violated Section 8(a)(1) unless, within seven days of issuance of a complaint, it takes action to stay state court proceedings and have any outstanding injunction withdrawn.

In *Loehmann's Plaza,* the Board quickly disposed of the constitutional right of access recognized in *Bill Johnson's* by holding that the decision in that case does not apply when the state court litigation would be preempted by federal labor laws. 305 N.L.R.B. No. 81, slip op. at 19-20. It then concluded that the *International Longshoremen's* test would not be met by the mere filing of a charge. *Id.* at 23 ("that action does not require any presentation of evidence. Neither does it involve any determination by a government official on the merits of an allegation"). Instead, the Board concluded that preemption is triggered by the issuance of a complaint, given that the issuance of a complaint is preceded by an investigation into the facts. *Id.* at 23. Thus, based on mere allegations of a violation of the Act by the Board's General Counsel, an employer such as Petitioner is deprived of its access to the state courts — even if a union's conduct is later found by the Board to be unprotected under the Act.

The present case presents the situation discussed but not decided in *Sears Roebuck* — Local 23 here elected against filing a charge with the Board upon being asked to vacate Petitioner's property. Consistent with *Sears, Roebuck,* Petitioner then presented the dispute to the state court, which ordered restrictions on picketing. Only then did Local 23 file an unfair labor practice

charge with the Board, upon which the General Counsel subsequently filed a complaint.[2]

The Court of Appeal accepted *Loehmann's Plaza* as a reasonable interpretation of the Act. Based upon Petitioner's constitutional right of access to the courts, Petitioner submits that a more exacting standard is here required. As this Court stated in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988), "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Here, such an construction is possible. As this Court noted in *Sears, Roebuck*, even after state court litigation is commenced by an employer, the Board's jurisdiction can be invoked and its remedial powers obtained. 436 U.S. at 207 n. 43. The cases cited in footnote 43 are examples of the Board requesting an injunction from a federal district court pursuant to Section 10(j) of the Act following the issuance of a complaint. *See, e.g., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 207 n. 43 (1978) (citing *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954)).[3] Such a proceeding would satisfy the preemption

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2. Local 23 raised the issue of preemption as a defense in the state court proceedings. The state court considered and rejected that defense. As the Board itself noted in *Loehmann's Plaza*, it was not inappropriate for the state court to decide the issue. *See* 305 NLRB No. 81, slip op. at 50; *see also International Longshoremen's Ass'n*, 476 U.S. at 393 ("when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court.").

3. The Board would also have other remedies available to protect its jurisdiction. As noted above, the preemption issue can be raised in the state court proceedings. It is also unquestioned that any state court action would be preempted if the Board were to issue a *decision* finding the conduct protected. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

showing mandated by *International Longshoremen's* — it would involve the presentation of evidence to a neutral third party in support of the preemption claim. It would also prevent the constitutional right of access from being defeated by a mere allegation of a violation of the Act. *See* 29 C.F.R. 101.8 (complaint may issue "[i]f the charge *appears* to have merit") (emphasis added). For Petitioner's First Amendment right to be meaningful, the General Counsel should be required to present evidence for a court to determine whether the union's conduct is "arguably protected" by the Act, or to proceed to a Board hearing on the complaint and seek a cease and desist order or other appropriate relief if the allegations are decided in its favor.

This case presents an opportunity for the Court to address several issues left open in the wake of *Bill Johnson's, Sears, Roebuck,* and *International Longshoremen's,* namely, whether state court jurisdiction "is preempted forthwith" upon the filing of a charge with the Board or the issuance of a complaint by the General Counsel following initiation of the state court proceedings and whether it is sufficient, under *International Longshoremen's,* that the Board itself believes that the conduct at issue is arguably protected under the Act for Petitioner's constitutional right of access to be defeated. In summary, because the Board's ruling in *Loehmann's Plaza* raises significant issues of constitutional and statutory law and implicates existing precedents of this Court, Petitioner respectfully submits that further review is appropriate.

II.

Petitioner's enforcement of "time, place, and manner" restrictions on picketing and handbilling on its property is insufficient to warrant a finding of disparate treatment of union activities.

This Court has, on several occasions, addressed the proper relationship between the rights of employees under Section 7 of the

NLRA and the property rights of employers. *See, e.g., Lechmere v. NLRB,* 112 S.Ct. 841 (1992); *Scott Hudgens v. NLRB,* 424 U.S. 507 (1976); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). This Petition addresses another aspect of that relationship. Specifically, since *Lechmere,* the Board has repeatedly relied upon a disparate treatment analysis, affirming Section 8(a)(1) findings originally based upon the accommodation principles of *Jean Country,* 291 N.L.R.B. 11 (1988), by finding a discriminatory denial of access to union pickets. *See, e.g., Pay Less Drug Stores Northwest, Inc.,* 312 N.L.R.B. No. 144 (1993); *Great Scot, Inc.,* 309 N.L.R.B. No. 84 (1992); *Food Lion, Inc.,* 304 N.L.R.B. No. 76 (1991). Because the Board's position makes the discriminatory access issue one of general public importance, Petitioner seeks review in the present case.

In the present case, the ALJ, relying on the Board's holding in *Jean Country,* 291 N.L.R.B. 11 (1988), found that Petitioner violated Section 8(a)(1) by discriminatorily refusing to permit Local 23 to picket and handbill on its Hempfield property "while permitting other organizations access to its property for purposes of soliciting its customers and related activities." (D.A. 71-72, 91). After the ALJ issued his opinion, this Court rejected the Board's *Jean Country* balancing test in *Lechmere v. NLRB,* 112 S.Ct. 841 (1992). The Board nevertheless upheld the 8(a)(1) finding, "solely because of [Petitioner's] disparate treatment of protected union activity." (D.A. 123). While the Board conceded that *Lechmere* rejected *Jean Country,* it found that *Lechmere* did not control in cases of disparate treatment. The Board concluded that Petitioner had "allowed other organizations *unlimited* access to its property for sales and solicitations." (D.A. 124) (emphasis added).

On appeal, Petitioner argued that the record evidence failed to support the Board's conclusion of disparate treatment. Specifically, the Board has held that discriminatory denial of access to union activities has been found where an employer's

property is "regularly the scene of a wide range of commercial and other activities unrelated to" the employer's operations, or where the employer permits similar activity in similar circumstances. *D'Alessandro's*, 292 N.L.R.B. 81, 84 (1988); *Jean County, supra.* In the present case, the record merely establishes that "[Petitioner] allows other organizations to solicit its customers on the sidewalk immediately in front of the store." (D.A. 75; *see also* D.A. 37 & n. 68 (employee testified that "*usually* around holidays there were church groups or school organizations in front of the store selling tickets and other things"; employee testified that "*occasionally* there were people in front of the store selling tickets for different things")) (emphasis added). Based upon this record, Petitioner argued that the Board established, at most, isolated access granted to charitable organizations, which had been held insufficient to compel a grant of access to non-employee union organizers. *See, e.g., Hammary Manufacturing,* 265 N.L.R.B. 57 n. 4 (1982); *Central Solano County Hosp. Foundation, Inc.*, 255 N.L.R.B. 468 (1981).

On appeal, the Court of Appeals stated as follows:

> The pickets in the present case were not soliciting support for Local 23 among the Hempfield employees. Rather, they were protesting the Company's unfair labor practices by carrying signs and distributing leaflets to customers. The Company raises the valid question of whether, in light of Babcock and Lechmere, an employer can ever be required to grant nonemployees access to his property if they seek such access to communicate, not with employees, but with customers. Since the NLRA does not confer rights on nonemployees (including customers), neither the givers nor receivers of information

> are protected in such a situation. This principle would seem to extend even to cases of alleged discriminatory denial of entry, so long as the people denied access are nonemployees and they seek to communicate with customers.

(30a). The court nevertheless upheld the Board's finding of an 8(a)(1) violation on the grounds that some of the pickets removed from the property were employees and that Petitioner discriminatorily enforced its property rights in that it permitted several representatives of the Steelworkers inside the store to communicate with its employees. (30a-32a).

It is undisputed that Petitioner granted Local 23 access to its property. It initially sought injunctive relief based upon the presence of "at most twelve picketers in front of the store". (D.A. 36 n. 65). The General Counsel produced no evidence showing that any other organization — union or non-union — was permitted access of that nature. After receiving the state court injunction, but prior to Local 23's filing of the unfair labor practice charge, Petitioner entered into an agreement under which pickets were permitted in its parking lot and at each entrance to its stores. (D.A. 40, 352-53). Pursuant to that agreement, Local 23 was permitted to utilize two pickets at each entrance and two pickets within a designated portion of Petitioner's parking lot to pass out handbills. (D.A. 352). This fact demonstrates that Petitioner was concerned not about access per se, but the scope of that access. While the Board characterized Petitioner's conduct as discriminatory, Petitioner argued that it imposed nothing more than legitimate "time, place, and manner" restrictions on the conduct at issue, restrictions which the Board itself has approved. *See Tecumseh Foodland*, 294 N.L.R.B. 486 (1989).

The fact that some of the individuals involved were employees does not deprive Petitioner of all rights of control over

its property. This Court recognized in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) that "the undisputed right of self-organization" and "the equally undisputed right of employers to maintain discipline in their establishments" are not "unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Id.* at 798. Citing *Republic Aviation*, the Sixth Circuit Court of Appeals, in affirming a district court's issuance of a Section 10(j) injunction limiting the number of pickets outside a nursing home, recently stated as follows:

> the quantity and location limitations are reasonable in light of the incidents that occurred at the facility. It is clear that off-duty employees do not have an unfettered right to enter the premises to solicit support. Rather, employee solicitation on the employer's property may be limited when necessary to maintain order.

Frye v. District 1199, Health Care and Social Services Union, Service Employees International Union, AFL-CIO, 996 F.2d 141, 145 (6th Cir. 1993) (citing *Republic Aviation*, 324 U.S. at 803-05)). In the present case, Petitioner resorted to the state court to prevent customer disruption from the presence of twelve pickets at the entrance to its store. As this Court noted in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), the Board itself places additional restrictions upon solicitation in retail marketing industries because of the potential for a direct and substantial interference with the employer's business. *Id.* at 493, 505-07 & nn. 11, 25. At the same time Petitioner obtained the injunction, it entered into an agreement with Local 23 permitting Local 23 to picket and handbill on its property. Such a restriction should be permitted in light of the cases cited above.

Finally, the Court of Appeals relied upon the Board's finding of unlawful assistance to the Steelworkers in upholding the Board's 8(a)(1) finding. The Court of Appeals concluded that "at least three" Steelworker representatives were permitted inside the Hempfield store to communicate with employees. (31a). Petitioner was found in violation of Section 8(a)(2) for rendering assistance to the Steelworkers. While Petitioner challenged that finding below, it does not include that challenge in the present Petition. As part of the 8(a)(2) issue, no evidence was presented that this access caused any disruption in the operation of Petitioner's store. Nevertheless, in addition to imposing a Section 8(a)(2) violation on Petitioner, the effect of the rulings below would be to require Petitioner to passively stand by in the face of trespass and mass picketing aimed at its customers that causes disruption to its business because it was found to have permitted the Steelworkers access on one occasion to speak with its employees in a non-disruptive manner. Because the two instances do not constitute "similar activity under similar circumstances," a finding of disparate treatment is inappropriate.

As stated above, the Board's repeated reliance on a disparate treatment theory makes this issue one of public importance. Petitioner submits that a place still exists for restrictions on the number and location of pickets and handbillers. The ruling below, however, considered the restrictions taken by Petitioner to be discriminatory. For all the reasons stated above, Petitioner submits that this matter is appropriate for review by this Court, and that a decision from this Court on the issue would be of significant benefit in the administration of the Act.

III.

The Board's decision to exclude 11 "dual function" employees from the bargaining unit — a decision which is unsupported by a clearly defined analysis and which cannot be squared with the Board's "well-established precedent" — presents an important issue in the administration of the NLRA warranting further review.

The Board has recently described its precedent on the issue of dual function employees as "well-established". *Textron Lycoming Division,* 308 N.L.R.B. No. 151, at 2 (1993) (citing *Berea Publishing Co.,* 140 N.L.R.B. 516 (1963)). In *Berea Publishing,* the Board refused to draw a "distinction between the part-time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer," stating as follows:

> In cases involving employees who work only part time for an employer, the Board determines unit inclusion on the basis of whether the employee is regularly employed for sufficient periods of time to demonstrate that he, along with the full-time employees, has a substantial interest in the unit's wages, hours, and conditions of employment [footnote omitted]. . . [W]e can perceive no distinction between the part-time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer. We believe the policies of the Act are best effectuated by according to each the same rights and privileges in the selection of the majority representative for the unit in which he works.

140 N.L.R.B. at 518-19. The Board also rejected a bright-line rule that would exclude any dual function employee who did not spend more than 50 percent of their time doing unit work. *Id.* Instead, it concluded that the controlling issue is whether the employees regularly perform unit work for sufficient periods of time to demonstrate that they possess a substantial interest in the unit's wages, hours, and conditions of employment. *Berea Publishing Co.*, 140 N.L.R.B. at 518-19; *see also Oxford Chemicals, Inc.*, 286 N.L.R.B. 187 (1987). Following *Berea Publishing*, numerous Board decisions have included dual-function employees working significantly less than 50 percent of their time in the unit. *See, e.g., Alpha School Bus Co.*, 287 N.L.R.B. 698 (1987) (2.5 hours each work day for four-month period); *Marine Petroleum Co.*, 238 N.L.R.B. 931 (1978) (one weekend day per week in addition to full weekly schedule outside unit); *Bob's Ambulance Service*, 178 N.L.R.B. 1 (1969) (a majority of weekends).

A total of 11 employees in the present case performed substantial work at both Greensburg and Hempfield. The Board excluded these individuals from the Hempfield bargaining unit. Neither the ALJ nor the Board found that the Greensburg employees in question did not regularly perform a sufficient amount of work at Hempfield to demonstrate "a substantial and continuing interest in the terms and conditions of employment" at the Hempfield facility. In the absence of such a finding, *Berea Publishing* would seem to dictate the inclusion of the 11 employees from the unit.

In affirming the ALJ's exclusion of the dual function employees, however, the Board apparently relied on the fact that these 11 employees "remained under the primary supervision of their Greensburg store supervisors and spent the majority of their working hours at the Greensburg store." (D.A. 127). Reliance upon these factors is inconsistent with the numerous decisions cited above in which the Board found that dual function employees

working significantly less than 50 percent of their time were properly included in a unit. The Board and the ALJ also considered other factors such as job functions, contact with other employees, and bargaining history. (D.A. 83-83, 127 & n. 11). According to *Oxford Chemicals*, however, such a "second tier community-of-interest analysis" is inappropriate once it is determined that the employees have a sufficient amount of work to demonstrate "a substantial and continuing interest in the terms and conditions of employment." 286 N.L.R.B. at 188.

In support of its conclusion that these 11 dual-function employees should be excluded from the unit, the Board primarily relied on the fact that the employees were already covered under an existing collective bargaining agreement and were represented by the Steelworkers while working at the Greensburg store, citing *Otasco, Inc.*, 278 N.L.R.B. 376 (1986). In *Otasco*, an existing bargaining unit included local truck drivers, but excluded over-the-road truckdrivers. The employer employed two local drivers (Parrott and Duck), both of whom also performed some over-the-road duties. The employer also employed eight over-the-road drivers. The petitioning union sought to represent a unit composed of all over-the-road drivers *and all local drivers*. The Board stated that, "[i]n these circumstances, ... the [existing collective bargaining agreement covering local drivers] bars the inclusion of dual-function employees Parrott and Duck in the unit sought to be represented by the Petitioner." *Id.* at 376 (emphasis added). It concluded that an appropriate unit for bargaining would include "[a]ll over-the-road drivers at the Employer's ... facility." *Id.* at 377.

The case of *Otasco* focuses on unit composition rather than unit placement. The present case involves the latter issue. For example, Petitioner did not argue that the unit should consist of "[a]ll full-time and regular part-time employees employed by Davis Supermarkets, Inc. at its Hempfield Township,

Pennsylvania location," the unit found appropriate by NLRB, plus all such employees who were employed at the Greenfield location. Instead, in keeping with the Board's presumption that single store units in the retail industry are appropriate, *see Sav-On Drugs*, 138 N.L.R.B. 1032 (1962), Petitioner argued that the 11 Greenfield employees should also have a voice in the selection of the Hempfield representative based upon their substantial interest in the wages, hours, and terms and condition of employment in that separate unit. For this reason, *Berea Publishing*, rather than *Otasco*, should control.

The Court of Appeals read *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991) to favor the Board's holding in this case. Petitioner submits, however, that the dangers presented in *Bentson Contracting Co.* do not apply to the case of a Greensburg employee who also worked at Hempfield. *Bentson Contracting Co.* holds that "[t]wo unions . . . simply cannot be the exclusive bargaining representative of the same employee with respect to the same terms and conditions for employment." *Id.* at 1266. In the present case, the conditions of employment are not the same — one set of conditions (and one representative) would apply to Greensburg and another set of conditions (and a separate representative) would apply at Hempfield. Indeed, the court in *Bentson Contracting* expressed a concern about the situation where one job overlapped two recognized job categories. *Id.* at 1266-67. In the present case, two different jobs at two different geographical locations are involved (*i.e.*, "Greensburg cashier" and "Hempfield cashier") rather than one.

The employees here, unlike *Bentson Contracting*, will not be simultaneously represented by two separate unions; instead, they would be represented by the Steelworkers while working at Greensburg and by the bargaining unit representative at Hempfield while working at that facility. It is possible, as the Court of Appeals recognized, that some issues might arise which would present the

potential for overlapping claims or demands between the bargaining representatives. The fact remains, however, that the 11 employees in question have a substantial interest in the terms and conditions of employment while working at Hempfield. Petitioner submits that a possible overlap between the two bargaining representatives is an insufficient basis to deprive these dual function employees of a vote regarding the bargaining representative at Hempfield.

The Court of Appeals from which this Petition emanates has stressed the need for well articulated reasoning in Board opinions, stating as follows:

> in reviewing the application of an agency's test to cases that come before it, we seek an assurance that the test is in fact guiding agency behavior, rather than merely serving as a cover for arbitrary and capricious decisionmaking. Without a fuller discussion of the critical facts, and absent a more explicit explanation of how these facts form the basis for the legal conclusions reached by the Board in this action, we have no assurance that such reasoned decisionmaking was present in the Board's disposition of this case.

United Food and Commercial Workers International Union, AFL-CIO, Local 150-A v. NLRB, 880 F.2d 1422, 1439 (D.C. Cir. 1989). In the present case, the Board based its decision on an improper "second tier" community of interest test and grounded its holding in *Otasco*, which addresses an issue of unit composition not here present. Its well established precedent, *Berea Publishing*, would seem to dictate the inclusion of the employees in question. Given that the issue presents an important question on the administration of the Act, the case involves an issue of general public importance

rather than one of concern only to the parties to this dispute. Under these circumstances, the Petition should be granted.

CONCLUSION

Based on the reasons stated above, Davis Supermarkets, Inc. respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

STUART A. WILLIAMS
Counsel of Record
ECKERT SEAMANS CHERIN
& MELLOTT
Attorneys for Petitioner
600 Grant Street
42nd Floor
Pittsburgh, Pennsylvania 15219
(412) 566-5946

APPENDIX A — DECISION OF UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT DATED AUGUST 27, 1992

DAVIS SUPERMARKETS, INC., Petitioner,

NATIONAL LABOR RELATIONS BOARD, Respondent,

United Food and Commercial Workers International Union, Local Union 23, AFL-CIO-CLC, Intervenor.

No. 92-1134.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 5, 1993.

Decided Aug. 27, 1993.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Stuart A. Williams argued the cause for petitioner.

David A. Fleischer, Sr. Atty., N.L.R.B., argued the cause for respondent. With him on the brief were Jerry Hunter, Gen. Counsel and Aileen A. Armstrong, Deputy Associate Gen. Counsel, N.L.R.B. Howard E. Perlstein also entered an appearance for respondent.

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James R. Reehl filed the brief for intervenor United Food and Commercial Workers Intern. Union, Local Union 23, AFL-CIO-CLC. Peter J. Ford also entered an appearance for intervenor.

Before MIKVA, Chief Judge; EDWARDS and BUCKLEY, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

MIKVA, Chief Judge:

This multifarious case concerns the alleged efforts by Davis Supermarkets, Inc., ("the Company") to combat an organizing campaign by the United Food and Commercial Workers International Union, Local Union 23, AFL-CIO-CLC ("Local 23") in the Company's Hempfield, Pennsylvania store in 1986. The National Labor Relations Board ("the NLRB" or "the Board") found that the Company had committed numerous unfair labor practices prohibited by sections 8(a)(1), 8(a)(2), and 8(a)(3) of the National Labor Relations Act ("the NLRA" or "the Act"). 29 U.S.C. § 158(a)(1)-(3). The Board issued a bargaining order to remedy the unfair labor practices and protect the majority sentiment previously expressed by the employees through authorization cards. 306 N.L.R.B. No. 86, 1992 WL 41351 (1992).

The Company challenges numerous aspects of the Board's decision and order, including many of the findings of unfair labor practices and the issuance of the bargaining order itself. We find that as to each of these challenges the Board's order is completely supported by the facts and is based on the proper application of federal labor law. We therefore uphold the Board's order in all respects.

Appendix A

I. BACKGROUND

We will briefly summarize the main facts of the case and will relate additional facts as it becomes necessary to do so in analyzing the numerous issues we are asked to review. As will become apparent, our decision is largely fact-driven, as were the Board's determinations.

Davis Supermarkets, a family-owned corporation engaged in the retail grocery business, owns and operates a supermarket in Greensburg, Pennsylvania, and a supermarket in Hempfield Township, Pennsylvania. The Greensburg store has been open for approximately thirty years. The United Steelworkers of America ("Steelworkers") has represented the Greensburg employees throughout the period relevant to this case. The Hempfield store opened in 1984. When the events giving rise to this case commenced in 1986, the Hempfield employees were unrepresented.

In March 1986, Local 23 launched a concerted organizing campaign in the Hempfield store, which employed more than one hundred men and women. Over the next few months, Donald Porter, an organizer for Local 23, met with various employees on and off the store's premises, urging them to sign authorization cards for Local 23. Some of the employees that he successfully recruited solicited authorization cards from other employees.

By April 19, 1986, a total of thirteen employees had signed authorization cards for Local 23. On that day, the Company summarily laid off eight workers, six of whom had signed authorization cards: Debra Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlene Shotts, and Sonja Welsh. In May, the Company fired or constructively fired two other employees

who had signed cards, Larry Miller and Charles Miscovich. In July, the Company constructively discharged Linda Kunkle, who had also signed a card for Local 23.

On May 1, at two separate meetings with various employees of the Hempfield store, Bob Davis, the chairman of the Company's board of directors, told the assembled workers that he wanted them to sign authorization cards for the Steelworkers. After one of the meetings, a Steelworkers representative from the Greensburg store and an official of that union handed out Steelworkers contracts and authorization cards to the employees. Following the other meeting, two Steelworkers representatives from the Greensburg facility distributed Steelworkers contracts and cards.

Despite the Company's anti-Local 23 actions, Local 23 concluded that it had attained majority support among the Hempfield store's employees and issued a continuing request for bargaining on May 13,1986. By May 24, 58 out of 109 employees had signed authorization cards for Local 23, and Local 23 had therefore actually achieved majority status. An election was scheduled for July 25. On July 22, however, Local 23, fearing a loss of support, requested cancellation of the election. This request was granted.

Meanwhile, a dispute raged between the Company and Local 23 pickets who were marching on the premises of the Hempfield store to protest unfair labor practices. On May 23, the Company filed a civil trespass suit in state court against the pickets and, on May 28, acquired an injunction enjoining them from entering the store grounds and limiting them to three pickets at each parking lot entrance. On June 2, Local 23 filed a charge with the Board, alleging that the Company had unlawfully prevented them from picketing in the parking lot. On July 25, the NLRB's General

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Counsel issued a complaint alleging that the Company had violated section 8(a)(1) by denying Local 23 access to the premises and by maintaining the civil trespass suit.

In late July, Local 23 resumed picketing, and some pickets distributed handbills to customers in the parking lot. The Company threatened them with arrest and, on August 2, a sheriff's deputy presented the pickets with a document indicating that they were not allowed in the parking lot. In late November, a number of laid-off employees of the Hempfield store resumed picketing on the sidewalk in front of the facility. The Company, despite the issuance of the General Counsel's complaint, obtained a court order from the state court requiring Local 23 and the pickets to show cause why they should not be held in contempt for violating the terms of the May 28 injunction.

Overall, between June 1986 and December 1987, the General Counsel filed four complaints that collectively alleged that the Company had, by its conduct at the Hempfield facility, committed numerous unfair labor practices in violation of NLRA sections 8(a)(1), 8(a)(2), 8(a)(3), and 8(a)(5). On March 28, 1990, an Administrative Law Judge ("ALJ") found that the Company had violated these sections by, among other actions: (1) firing or constructively firing nine employees for the purpose of discouraging union activity; (2) urging employees to join the Steelworkers and permitting only that union to solicit employees in the Company's store; (3) refusing to allow Local 23 to picket or handbill on its property while allowing other organizations access to the store's premises; and (4) continuing a state trespass suit after the General Counsel had issued a complaint with respect to the denial of access to the Company's property. In addition, the ALJ found that a bargaining order was necessary to remedy the unfair labor practices and protect the majority sentiment previously expressed through authorization cards.

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On February 27,1992, the Board affirmed the ALJ's decision in all major respects, with only slight modifications to the ALJ's findings. 306 N.L.R.B. No. 86, 1992 WL 41351. The Board's order requires the Company to cease and desist from the unfair labor practices it is found to have committed and prohibits the Company from otherwise violating the employees' self-organization and collective bargaining rights. In addition, the order requires the Company, among other things, to offer the nine improperly discharged employees reinstatement; to make them whole for any loss of pay or seniority; to make Local 23 whole for legal expenses; and, on request, to bargain with Local 23 as the exclusive representative of the employees at the Hempfield store.

The Company challenges the findings of unfair labor practices as to the nine firings, the aiding of the Steelworkers at the Hempfield facility, the discriminatory denial of access to the pickets, and the maintenance of the state trespass suit after the General Counsel issued his complaint. It also asserts that there is not a sufficient basis for a bargaining order.

II. LAYOFF OF SIX EMPLOYEES ON APRIL 19, 1986

The Board found the April 19 layoffs of Debra Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlene Shotts, and Sonja Welsh to be violations of sections 8(a)(1) and 8(a)(3) of the Act. Section 8(a)(1) states, "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the [self-organization and collective bargaining] rights guaranteed in section 157 of this title." 29 U.S.C. 158h(a)(1). Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

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In assessing discriminatory discharge cases, we are required to use an approach known as the *Wright Line* test (after *Wright Line,* 251 N.L.R.B. 1083, 1980 WL 12312 (1980), *enforced,* 662 F.2d 899 (lst Cir.1981), *cert. denied,* 455 U.S. 989,102 S.Ct. 1612, 71 L.Ed.2d 848 (1982)). Under this approach, "[w]here a termination is alleged to be improper, the NLRB General Counsel bears the burden of demonstrating that 'an antiunion animus contributed to the employer's decision to discharge an employee'" *Avecor, Inc. v. NLRB,* 931 F.2d 924, 928 (D.C.Cir.1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 912, 116 L.Ed.2d 812 (1992) (quoting *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 395,103 S.Ct. 2469, 2471, 76 L.Ed.2d 667 (1983)). If the General Counsel makes this prima facie showing, the employer can nonetheless avoid an unfair labor practice finding by showing "by a preponderance of evidence that the worker would have been fired even if he had not been involved with the union." *Transportation Managment,* 462 U.S. at 395,103 S.Ct. at 2471.

The Company alleges that it fired the six employees for a variety of valid reasons, including "attitude problems" (Good, Hilty), poor performance (Defibaugh, Garris, Welsh), and consolidation in response to slow business (Defibaugh, Garris, Shotts). The Board did not find these explanations believable, in light of the shifting reasons offered for the dismissals, the lack of evidence of performance and attitude problems, the absence of prior warnings to the employees supposedly fired for such problems, and the quick replacement of the workers allegedly laid off for economic reasons with employees from the Greensburg store. The Board found instead that the firings were part of a strategy to suppress Local 23's organizing campaign.

The Company contends that the Board lacked substantial evidence to find that "antiunion animus" was the actual motivation

for the firings. To satisfy this requirement, the General Counsel generally must establish that the employer knew that the workers it laid off were involved in union activities. The Company maintains that on April 19, it was unaware of the union activities of any of the six employees, and that the General Counsel failed to show otherwise.

Despite the Company's assertions, there is considerable direct evidence that it knew of or suspected the pro-union sympathies of at least some of the workers. For example, about a year before she was fired, Shotts asked two managers about getting a union in the store, and the managers warned her not to talk about it any further. Also, on March 25,1986, Welsh's immediate supervisor interrogated her about a Local 23 meeting that she had attended. As for the other employees, however, there is, as the Company maintains, scant direct evidence that the Company was aware they were union supporters when it discharged them.

The lack of direct evidence does not, however, necessarily render the Board's findings of anti-union motivation inadequate. The Board found substantial *circumstantial* evidence that the Company knew of the employees' union activities, and "[a]lthough the Board may not base its decision on mere conjecture, the element of knowledge may be shown by circumstantial evidence from which a reasonable inference may be drawn." *Abbey's Transp. Services, Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir.1988). "Similarly, the Board may infer discriminatory motive from circumstantial evidence." *Id.* Among the factors on which the Board may base such inferences are "the timing of the discharges in relation to the union activity [and] the simultaneous nature of otherwise unconnected dismissals." *Id.* at 580.

Both the timing and the nature of the discharges in this case

suggest anti-union motivations. The firings occurred just as Local 23's campaign was picking up steam, and the employees, who worked in various different departments, were all dismissed on the same day for entirely disparate reasons. Furthermore, of the eight employees laid off, six were union supporters, and this occurred at a time when only thirteen out of more than one hundred employees had signed cards. *Cf. NLRB v. Camco, Inc.*, 340 F.2d 803, 810 (5th Cir.1965) (holding that knowledge of union activities could be inferred from the fact that an employer discharged eleven of sixteen union adherents without discharging any of its remaining seventy-four employees); *see also* Brief for NLRB at 40 (relying on *Camco).* In light of the summary and targeted nature of the dismissals and the Company's failure to come up with plausible legitimate reasons for them, there was probably sufficient evidence to find that the six firings were violations of the Act.

Nonetheless, there is a somewhat troubling lack of evidence that the Company even had the opportunity to learn of the union advocacy of several of the fired workers. Hilty and Garris, in particular, seem to have performed very few union-related actions on store premises within the sight of other people.

There is, however, an alternative and less problematic manner in which (l) assess the legality of these six layoffs. Although the General Counsel ordinarily must show that the employer was aware of the pro-union sentiments of a dismissed employee in order to establish an 8(a)(3) violation, he does not have to make such a showing if the dismissal is part of a mass layoff "for the purpose of discouraging union activity." *Birch Run Welding & Fabricating Inc. v. NLRB,* 761 F.2d 1175, 1180 (6th Cir.1985) As the Sixth Circuit has explained:

> The focus of the theory is upon the employer's

> motive in ordering extensive layoffs rather than upon the anti-union or pro-union status of particular employees. The rationale underlying this theory is that general retaliation by an employer against the workforce can discourage the exercise of section 7 [self-organization and collective bargaining] rights just as effectively as adverse action taken against only known union supporters.

Id. at 1180.

In other words, it is not necessary to establish the Company's awareness of each discharged worker's union advocacy, so long as the firing was part of a mass layoff. The NLRB, in upholding the ALJ's findings, relied on a mass discharge theory:

> The Respondent excepts to the judge's finding that the Company had knowledge of the employees' union activity. In agreeing with the judge's finding that the discharges were part of a scheme to thwart the employees' organizing drive, we also rely on *ACTIV Industries*, 277 NLRB 356 fn. 3, 1985 WL 46074 (1985), in which the Board stated, "[W]e emphasize that it is the Respondent's mass discharge, and not its selection of employees for discharge, that is unlawful. Accordingly, the General Counsel was not required to show a correlation between each employee's union activity and his or her discharge . . . . Instead, the General Counsel's burden was to establish that the mass discharge was ordered to discourage union activity or in

retaliation for the protected activity of some."

306 N.L.R.B. No. 86 at 2, 1992 WL 41351.

The Board's finding of an unlawful mass layoff is clearly supported by substantial evidence. A supervisor told Defibaugh on April 19, the day of the firings, that "they heard the union was getting close to the number they needed for an election and they were getting rid of the troublemakers and the people with attitude problems."

Nonetheless, the Company attacks the Board's reliance on the mass discharge theory, claiming that it was deprived of a full and fair hearing because the theory was neither raised in the complaint nor litigated before the Board. We are not persuaded by this argument. The Board's Rules and Regulations require only that the complaint include "a clear and concise description of the acts which are claimed to constitute unfair labor practices," not that it include the legal theory relied on. 29 C.F.R. 102.15 Nor does "[t]he due process clause . . . require a precise statement of the theory upon which the General Counsel intends to proceed under the Act, with the threat that failure of precision in pleading will require the General Counsel to re-try the case." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 136 (2nd Cir.1990).

Although the General Counsel's complaint did not specifically mention the mass discharge theory, it clearly referred to the conduct constituting an unlawful mass layoff when it charged that "Respondent engaged in the [dismissals] . . . in order to discourage employees from engaging in [pro-Local 23] activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection." [DA 1328-39]. The complaint was therefore adequate to raise the mass discharge issue.

The General Counsel provided the Company with adequate notice of the mass layoff issue, not only in the complaint, but also in the hearing itself. Before the ALJ, the General Counsel explicitly contended that the firings were part of an overall scheme to thwart Local 23's organizing drive by getting rid of "troublemakers and people with attitude problems." This argument clearly raised the mass discharge theory. The Company consequently had a full and fair opportunity to litigate the matter.

In any event, the Company would not have been prejudiced by the alleged omission of the mass layoff theory from the complaint and the hearing because there is no significant defense to the mass layoff charge that the Company did not raise anyway in defending the individual dismissals. When an employer is not prejudiced by the Board's reliance on a theory not specifically addressed in the complaint or at the hearing, the employer's due process rights are not violated. *See Pergament*, 920 F.2d at 137.

We thus hold that the first part of the *Wright Line* test, requiring a showing that firings were motivated by anti-union animus, is satisfied under the mass discharge theory. According to the second part of the test, the employer can overcome the showing of antiunion motivation only by establishing, by a preponderance of the evidence, that "the discharge would have occurred in any event and for valid reasons." *NLRB v. Transportation Management Corp.*, 462 U.S. at 398, 103 S.Ct. at 2473.

The Board properly found that the Company failed to meet this burden. As we noted above, *supra p.* 6, the Company proffered allegedly valid reasons why each of the six employees was fired on April 19. The Board confidently rejected all of these explanations as inconsistent and implausible. "Under [the substantial evidence standard of 5 U.S.C. 706(2)(E)], our function is to determine only

whether the agency could fairly and reasonably find the facts as it did." *Throckmorton v. National Transp. Safety Bd.*, 963 F.2d 441, 444 (D.C.Cir.1992) (citations omitted). Because the Board's findings were clearly reasonable, we see no basis for overturning its conclusions. We therefore uphold the Board's determination that the six April 19 layoffs constituted unfair labor practices in violation of sections 8(a)(1) and 8(a)(3) of the Act.

III. LAYOFF OF THREE EMPLOYEES AFTER APRIL 19, 1986

In addition to the six April 19 firings, the Board also found three discharges or constructive discharges that occurred in later months to be violations of sections 8(a)(1) and 8(a)(3). Because the dismissals of Larry Miller, Charles Miscovich, and Linda Kunkle occurred on three different dates ranging from May to July, the mass discharge theory does not apply. In order to establish antiunion animus, the General Counsel was therefore required to establish that the Company was aware that each of the three employees supported Local 23.

We find that there is substantial evidence that the Company knew of the pro-union activities of these three workers. We also uphold the Board's conclusion that the firings were motivated only by anti-union animus. Perhaps the strength of the Board's position explains why, in its brief, the Company de votes all of three sentences to challenging these unfair labor practice findings.

A. Larry Miller

Miller was discharged on May 14, 1986. The Company alleges that it fired Miller, a bagger and stockboy, because, while on break, he ate food that he had stolen from the store. The Board found,

however, that the store manager who fired Miller never even asked him whether he had paid for the items. Moreover, neither of the two employees with whom Miller had been eating were similarly discharged. In light of the fact that Miller repeatedly spoke to Porter, Local 23's organizer, in the parking lot of the Hempfield store, and that the store manager once told Porter to leave Miller alone, there is substantial evidence that the Company knew of Miller's support of Local 23 and fired him for this reason.

B. Charles Miscovich

Miscovich worked a day shift at the Hempfield store because he also had a night job at a gas station. In mid-May, shortly after Miscovich signed a Local 23 authorization card, the store manager began scheduling him for night shifts. When Miscovich reminded the manager of his situation, he responded that Miscovich had to work when told to or not work at all. After that, Miscovich was never able to work at the store again.

There is no doubt that the Company was aware of Miscovich's pro-union stance, for he was called to a May 12 meeting where Bob Davis, the chairman of the Company, told the assembled workers that he knew they had all signed authorization cards. There is substantial evidence to support the Board's conclusion that the Company constructively discharged Miscovich in violation of sections 8(a)(1) and 8(a)(3).

C. Linda Kunkle

On July 26, Kunkle quit her job, after suffering through three weeks of inexcusable treatment. The Company transferred her from an office job to the meat department, reduced her hours, required her to stay in a back room and wrap meat, and forbade

other employees to talk to her about anything except meat.

There is no doubt that the Company was aware of Kunkle's pro-union activities. Kunkle was an active and public Local 23 supporter who had signed an authorization card, solicited cards from other employees, and picketed the store to protest its unfair labor practices. The Company apparently photographed her picketing. Moreover, she was one of the employees present at the May 12 meeting where Bob Davis told the assembled workers that he knew they had all signed authorization cards. We uphold the Board's finding that Kunkle was unlawfully constructively discharged.

IV. THE BARGAINING ORDER

The Company asks us to vacate the Board's bargaining order. Under the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), there are two categories of cases in which the Board may issue a bargaining order: "exceptional cases marked by outrageous and pervasive unfair labor practices" ("Category I") and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process" ("Category II"). *Id.* at 613-14, 89 S.Ct. at 1940.

In Category II cases, before we will enforce a bargaining order, we must find that substantial evidence supports three conclusions: (1) at some time, the union had majority support within the bargaining unit; (2) the employer's unfair labor practices have had the tendency to undermine majority strength and impede the election process; and (3) the possibility of erasing the effects of past unfair labor practices and of ensuring a fair rerun election by the use of traditional remedies is slight, and the once-

expressed sentiment in favor of the union would be better protected by a bargaining order. *St. Francis Fed'n of Nurses & Health Professionals v. NLRB*, 729 F.2d 844, 854-55 (D.C.Cir.1984).

Our cases employ this three-part test only in Category II situations, however. *See Avecor*, 931 F.2d at 934. Local 23, intervening in this appeal, argues that this case belongs in Category I and that the three prerequisites therefore do not apply.

There is no need to decide whether this case falls within Category I or Category II. The case clearly satisfies the three-part inquiry applied to Category II cases. Since it meets this greater burden, it is not necessary for us to designate the case as belonging in one category or the other.

A. Local 23's majority status

In issuing the bargaining order, the NLRB concluded that on May 24, 1986, there were 109 employees in the Hempfield bargaining unit, and that 58 of those employees, a majority, had formally expressed support for Local 23. The Board declined to address the unit placement of six additional employees because their placement in the Hempfield unit mathematically could not affect Local 23's majority status. 306 N.L.R.B. No. 86 at 7 n. 11, 1992 WL 41351.

The Company asserts that the Board erred in making these calculations by wrongly excluding some workers from the bargaining unit and wrongly including others. It maintains that if the Board had properly placed each of the employees, the margin of support for Local 23 would have been smaller, and the status of the six employees whom the Board did not consider would have been dispositive. We reject the Company's claims and hold that the

Appendix A

Board correctly determined the composition of the bargaining unit as of May 24. Local 23 unquestionably enjoyed majority support on that day.

1. The exclusion of eleven dual-location employees

In the midst of Local 23's organizing campaign, the Company began to bring workers from its Greensburg store to perform the same jobs in Hempfield on a part-time or temporary basis. The Company contests the Board's decision to exclude from the Hempfield bargaining unit eleven such workers who were members of the Steelworkers, the bargaining representative of the Greensburg employees.

The Company and Local 23 stipulated at the representation hearing on June 3, 1986, that "those persons who have been transferred to the Hempfield location from the Greensburg location are permanent employees, employed in the unit, eligible to vote in the election." The Company argues that the stipulation encompasses the eleven disputed employees and that the Board should therefore have included them within the Hempfield bargaining unit.

The Board does not dispute that the stipulation is binding, but it asserts that it does not cover the eleven employees in question. We find that the Board's interpretation of the scope of this stipulation is a reasonable one. Nine of the eleven employees were not truly "transferred," for they continued to spend much of their time working at Greensburg. The two others, Neil Vario and John Shumaker, were in fact transferred and worked at the Hempfield store for a time. Both men were, however, told at the time of their transfers, and repeatedly thereafter, that their reassignments were only temporary and that they would be returned to Greensburg as

soon as possible. (Vario returned to Greensburg after four months, and Shumaker returned after about a year). In light of the clearly temporary character of their transfers, Vario and Shumaker could not properly be deemed "permanent employees" of the Hempfield store within the meaning of the stipulation.

The Company maintains, however, that the eleven employees should have been included in the Hempfield unit whether or not the stipulation applied to them. It argues that the workers shared a sufficient "community of interest" with the other Hempfield employees to be included in the Hempfield bargaining unit. The Board, however, found that most of the workers in question spent the majority of their hours in the Greensburg facility and remained under the primary supervision of the Greensburg store supervisors. It thus held that they did not share an adequate community of interest with the Hempfield unit.

More importantly, all eleven workers were represented by the Steelworkers throughout the period they worked at the Greensburg store. The Board stressed that it would be incongruous for them to be represented simultaneously by the Steelworkers and Loca 23. We agree. In *Bentson Contracting Co. v. NLRB,* this Court, reviewing the Board's placement of employees who performed two different categories of work for the same employer into two different bargaining units, stated, "Two unions . . . simply cannot be the 'exclusive' bargaining representative of the same employee with respect to the same conditions of employment." 941 F.2d 1262, 1266 (D.C.Cir.1991). We observed:

> If such an employee had a grievance regarding work breaks, sick pay, vacations, insurance, work assignments or any other general conditions of employment, it is unclear which

> union should represent him. The employer would constantly face the threat of breaking the law by bargaining with the wrong representative. In addition, there would be significant burdens on the combination employees: they would have to join two unions, pay dues twice, attend two sets of meetings, and somehow split their allegiance . . . .

Id. at 1266.

The eleven dual employees in this case would face these aptly-described issues if they were placed in the Hempfield unit in addition to the Greensburg unit. Would the Steelworkers or Local 23 represent them in disputes over vacation time and insurance, not to mention over work assignments and transfer policy? Because the workers' primary community of interest was with the Greensburg unit, and because they were all members of the Steelworkers, the representative of that unit, we uphold the Board's decision to exclude them from the Hempfield unit.

2. The inclusion of three office clerical employees

In exchange for Local 23's stipulation not to challenge the inclusion of employees permanently transferred from Greensburg to Hempfield, the Company stipulated that three office clerical employees were included in the Hempfield unit. The Company now attempts to renege, suggesting that it is unfair to hold the Company to its stipulation regarding transfers. The Company contends that it should have been given the opportunity to establish that the office clerical workers lacked a sufficient community of interest with other Hempfield employees to be included in the Hempfield bargaining unit.

We can discern no reason why the Company should not be held to its stipulation as to these three employees. The Board did not fail to enforce Local 23's stipulation regarding the transferred employees; it simply failed to interpret the stipulation in the manner the Company would have preferred. On the other hand, there is no confusion concerning the meaning of the Company's stipulation that "there is no basis for excluding any employee on the basis of their being an office clerical employee." As we have held, "If the terms of the stipulation are unambiguous, the Board must hold the parties to its text." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C.Cir.1991). The Board properly applied the Company's stipulation, and we therefore uphold the inclusion of the three office clerical employees.

3. The inclusion of Defibaugh as a non-supervisor

The Company challenges the Board's conclusion that Debra Defibaugh was not a supervisor and was therefore eligible for the Hempfield bargaining unit.

The Board found that although she had the title of "manager" of the bakery, and although she had some scheduling responsibilities, Defibaugh otherwise performed the same work as other bakery employees. She had no effective authority to recommend decisions regarding hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, or disciplining other workers. Because of her lack of supervisory duties, the Board concluded that Defibaugh was not a supervisor within the meaning of the Act.

This Court has held that the Board must be granted a large measure of discretion in determining whether an employee satisfies the definition of a "supervisor" in section 2(11) of the Act.

Appendix A

Clark & Wilkins Indus., Inc. v. NLRB, 887 F.2d 308, 312-13 n. 9 (D.C.Cir.1989), *cert. denied* 495 U.S. 934, 110 S.Ct. 2177, 109 L.Ed.2d 505 (1990). In this case, the Board reasonably determined, in light of substantial evidence, that Defibaugh did not perform the duties of a supervisor under the NLRA. We find no reason to reverse the Board's well-articulated judgment.

4. The exclusion of five college students and Tim Sheridan

The Board excluded five college students and a bagger named Tim Sheridan from the unit because they worked primarily during summer vacation and holiday periods. Their employment during other periods was, according to the Board, "sporadic and intermittent, at best." 306 N.L.R.B. No. 86 at 78, 1992 WL 41351. The Company claims that these six employees shared a sufficient community of interest with the other employees in the Hempfield unit to be included in the unit.

The NLRB excludes from bargaining units students who work during the summer unless they continue to work on a regular parttime basis after returning to school. *Crest Wine and Spirits, Ltd,* 168 NLRB 754 (1967). The Board found that none of the students met this requirement. As for Tim Sheridan, whether or not he was actually a student (the record is unclear on this point), his working calendar mirrored that of the college students almost exactly. The Board was therefore justified in excluding him from the unit for the same reasons it excludes students who work only during summers and vacation periods.

5. The inclusion of nine discharged employees

The Board included within the Hempfield unit the nine employees who were dismissed in violation of sections 8(a)(1) and

8(a)(3). *See supra,* pp. 6-13, 1992 WL 41351: The Company contends that because the nine workers were lawfully discharged for valid reasons, their authorization cards should not have been counted in calculating Local 23's majority status as of May 24.

As we explained above, however, the firings were in fact illegal. Consequently, the Board properly included the nine workers in the unit. Linda Kunkle did not leave her job until July, so the Board properly included her in the unit as of May 24 in any event.

6. The Board's failure to reach the status of six employees

In upholding the ALJ's finding of Local 23's majority status, the Board found it "unnecessary to determine the unit placement of the five Greensburg employees [working part-time at Hempfield] who were not Steelworkers members." 306 N.L.R.B. No. 86 at 7 n. 11, 1992 WL 41351. The Board also declined to address the proper placement of Thomas Howard, a frozen food manager who may have been a supervisor and who arguably did not share a community of interests with the Hempfield bargaining unit. The Company requests that we remand so that the Board can determine the status of these six workers.

The Board found it unnecessary to consider these employees because, "[E]ven assuming that these six individuals should be included in the unit, the Union still would have represented a majority on May 24." *Id.* We have found that the Board did not improperly include or exclude any workers from the Hempfield bargaining unit. Consequently, the Board's calculation that it was not essential to determine the status of these six workers remains valid. We therefore uphold the Board's finding that Local 23 enjoyed the support of a majority of the Hempfield unit on May 24, 1986.

We do, however, remand for the Board to determine the unit placement of any of the six individuals who are still employed at the Hempfield store. As we observed in *Avecor*, "[their] status may not affect the union's card majority, but it will determine [their] potential for membership in the union." 931 F.2d at 933. We stress, however, that this remand does not affect the validity of the bargaining order and should not in any way delay the ultimate resolution of this long, drawn-out bargaining dispute.

B. The other requirements for a bargaining order

As we noted above, *supra p.* 13, in order to implement a *Gissel-type* bargaining order in a Category II case, the NLRB must not only find that Local 23 had majority support, but also that the unfair labor practices tended to undermine the majority support and that traditional remedies would not suffice to ameliorate the situation. The Company urges us to overrule the Board's findings that these prerequisites were satisfied in the present case.

1. Waiver

The Board contends that the Company did not challenge the bargaining order on these grounds below and therefore waived the argument under section 10(e) of the Act. That section provides, "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e).

The Board's waiver argument fails. In the Company's exceptions to the ALJ's proposed decision, it specifically objected to the ALJ's finding that the Company "engag[ed] in a course of unlawful conduct which undermined [Local 23's] majority status

and prevented the holding of a fair election." [D.A. 119]. It also stated an exception to the ALJ's finding that "a bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and otherwise to remedy the violations committed." [D.A. 118]. These exceptions clearly constitute challenges to the Board's conclusion that the second and third parts of the three-part *Gissel* test were satisfied.

Although the Company did not raise these arguments again before the Board, articulating them in its exceptions to the ALJ's decision was adequate to satisfy section 10(e) of the Act. As this Court has held, "Although briefing and argument before the Board are desirable . . . section 10(e) does not require such procedures . . ." *Local 900, Int'l Union of Elec, Radio and Mach. Workers, AFL-CIO v. NLRB*, 727 F.2d 1184, 1192 (D.C.Cir.1984). The critical inquiry is whether "the Board was . . . given notice of the parties' objections to the Board's solutions . . . ." *Id.* The Board unquestionably was given such notice in the present case. The Company therefore did not waive its right to challenge in this Court the Board's findings regarding the impact of the unfair labor practices and the necessity of a bargaining order.

2. *Tendency of unfair labor practices to undermine union support*

The Company's claims fail on the merits, however. First of all, we see no fault with the Board's finding that the Company's unlawful activities "undermined the Union's majority status."

In contesting this finding, the Company asserts that the unfair labor practices could not have caused Local 23 to lose majority strength because most of the illegal conduct took place before Local 23 reached majority status on May 24. There are several

problems with this argument. First of all, although the Company initiated the majority of the unfair labor practices before May 24, much transpired after that date that may have intimidated Hempfield employees who were considering supporting Local 23. For example, the Company failed to recall Shotts, although her supervisor had told her she would be recalled. The store manager continued to schedule Miscovich only for the evening shift and then ceased scheduling him at all. He also removed Linda Kunkle from her office job and sentenced her to silent labor in the meat department. Moreover, the Company continued to prosecute its trespass suit against the Local 23 pickets and acquired a court order limiting their access to the store premises. (We determine below, *infra p.* 30, that the maintenance of this lawsuit was unlawful). These unfair labor practices alone may have provided a sufficient basis for the Board's conclusion that the Company's conduct undermined support for Local 23.

The post-May 24 actions do not stand alone, however. The Company is simply wrong when it asserts that the Board should not have considered the numerous unfair labor practices that occurred before Local 23 reached majority status. The Third Circuit has "rejected the contention that unfair labor practices which occur before the achievement of union majority [cannot] be relied upon by the Board in issuing a bargaining order." *United Oil Mfg. Co. v. NLRB*, 672 F.2d 1208, 1212 (3d Cir.), *cert. denied*, 459 U.S. 1036, 103 S.Ct. 446, 74 L.Ed.2d 601 (1982) (citing *NLRB v. Permanent Label Corp.*, 667 F.2d 512, 519 (3d Cir.1981), *cert. denied*, 455 U.S. 940,102 S.Ct. 1432, 71 L.Ed.2d 651(1982) (en banc)). We agree with the Third Circuit, for, as that Court has sensibly noted, "[f]orbidding the Board from considering such conduct sets an artificial time barrier and ignores the possible cumulative effect of anti-union activity." *Permanent Label*, 657 F.2d at 519.

Moreover, it is important to consider that many of the employees who were intimidated against supporting Local 23 in May, when it achieved a bare majority, were likely *still* intimidated in July, when it lost its majority status. In other words, the earlier unfair labor practices deterred some employees from *ever* supporting the union. It would be nonsensical to prevent the Board from considering the impact of the earlier unlawful conduct, for it directly affected the tally when Local 23 lost majority support.

In sum, there is substantial evidence that the Company's illegal actions had an extremely damaging effect on Local 23's organizing campaign and contributed to its loss of majority status. We therefore uphold the Board's finding that the second prerequisite for a *Gissel* bargaining order was satisfied.

3. The need for a bargaining order

We see even less reason to disturb the Board's finding as to the third prerequisite that, due to the employer's serious and pervasive unfair labor practices, the possibility of ensuring a fair election is slight and employee sentiment would, on balance, be better protected by a bargaining order. We generally defer to the NLRB's expertise regarding this requirement, for, as we have noted, it "is a determination largely within the special competence of the Board." *Road Sprinkler Fitters Local Union v. NLRB*, 681 F.2d 11, 24 (D.C.Cir.1982), *cert. denied*, 459 U.S. 1178, 103 S.Ct. 831, 74 L.Ed.2d 1025 (1983).

The ALJ explained cogently, and in some detail, why he believed, "[i]n view of the degree and pervasiveness of the unfair labor practices, [that] the holding of a fair election is no longer possible." He noted the large number of unfair labor practices, how they were committed by some of the top officials in the company,

and how they were directed at numerous employees. He also observed how the Company's conduct instilled "a strong fear of union representation" in the employees. The Board affirmed the ALJ's conclusions. Although it failed to take into account the effect of any employee turnover, as required by *Avecor*, 931 F.2d at 937 ("before issuing a category II bargaining order, the Board must carefully consider employee turnover"), the Company did not challenge the order on that basis. Accordingly, we see no reason to overturn the Board's decision.

Because all the prerequisites for a *Gissel* bargaining order are satisfied, we uphold the Board's issuance of such an order.

V. THE COMPANY'S ASSISTANCE TO THE STEELWORKERS

As we noted above, *supra p.* 3, the Board found that on May 1, Bob Davis called two different meetings of employees at the Hempfield store and told them that he wanted them to sign authorization cards for the Steelworkers. When, at one of the meetings, an employee asked what the Steelworkers had to offer the employees, Davis became irate and shouted that they should just sign the cards. After each meeting, Davis sent the employees to a room where Steelworkers representatives distributed authorization cards and union contracts to them. At one point, Davis poked his head through the doorway of one of these rooms and reminded the workers to sign the cards.

The Board found that by rendering this assistance to the Steelworkers, the Company violated section 8(a)(2) of the Act, which forbids an employer "to dominate or interfere with the formation . . . of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2). The Company contests

this ruling. It points out that Piccolo, a Steelworkers organizer, testified before the ALJ that when he visited Hempfield on May 1, he deceptively informed Davis that he wanted to speak to Greensburg employees working at the Hempfield facility about transfer policy. Consequently, the Company argues, Davis did not intend to help the Steelworkers organize Hempfield employees when he called the meetings.

There are several flaws in the Company's argument. First of all, the ALJ specifically found Piccolo to be a non-credible witness, and we accord great deference to the credibility determinations of a judge who observed a witness testify. Second, the groups of employees gathered by Davis on May 1 included workers who were not Greensburg transfers. This fact belies the Company's assertion that Davis was simply assembling Greensburg employees to talk to Piccolo about transfer policy. Finally, regardless of the purported purpose of the meetings, the Company offers nothing to call into question the Board's finding that at these meetings, Davis personally ordered the employees to sign Steelworkers cards. Accordingly, we affirm the Board's conclusion that the Company violated section 8(a)(2) by assisting the Steelworkers.

VI. REFUSAL TO ALLOW PICKETING ON COMPANY PROPERTY

From the time twelve pickets began marching on the sidewalk in front of the Hempfield store on May 23, 1986, to protest the Company's unfair labor practices, the Company conducted a relentless campaign to keep the pickets off its property. *See supra* p. 4. Moreover, the Company invited three organizers from the Steelworkers to come inside the store to attempt to organize the employees. *See supra pp.* 3-4. The Board found that the

Company's "disparate treatment of protected union activity" violated section 8(a)(1) of the Act. The Company challenges this finding.

The Board and the courts have long been engaged in an effort to resolve conflicts between private property rights and the rights granted by section 7 of the NLRA "and to seek a proper accommodation between the two." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543, 92 S.Ct. 2238, 2241, 33 L.Ed.2d 122 (1972). This accommodation "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956).

In *Babcock* the Supreme Court addressed the issue of whether an employer may bar nonemployee union organizers from his property. The Court placed a high burden on attempts by such organizers to force an employer to grant them access. It held that the union must show that it has no other reasonable means of communicating its organizational message to the employees or that the employer's access rules "discriminate against the union by allowing other distribution." *Babcock*, 351 U.S. at 112, 76 S.Ct. at 684. *See also Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205, 98 S.Ct. 1745, 1761-62, 56 L.Ed.2d 209 (1978) (construing *Babcock*).

Babcock suggested that when the NLRA requires an employer to grant access to his property to nonemployee organizers, it does so only to protect the rights of his employees. The employer will be forced to allow the nonemployees on his premises if they lack a reasonable alternative means to reach his employees, but only because his employees' "right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-

organization from others." *Babcock,* 351 U.S. at 113, 76 S.Ct. at 685. Recently, in a similar context, the Court made clear that "the NLRA confers rights only on *employee$* not on unions or their nonemployee organizers." *Lechmere, Inc. v. NLRB,* __ U.S. __, __, 112 S.Ct. 841, 845, 117 L.Ed.2d 79 (1992).

The pickets in the present case were not soliciting support for Local 23 among the Hempfield employees. Rather, they were protesting the Company's unfair labor practices by carrying signs and distributing leaflets to customers. The Company raises the valid question of whether, in light of *Babcock* and *Lechmere,* an employer can *ever* be required to grant nonemployees access to his property if they seek such access to communicate, not with employees, but with customers. Since the NLRA does not confer rights on nonemployees (including customers), neither the givers nor receivers of information are protected in such a situation. This principle would seem to extend even to cases of alleged discriminatory denial of entry, so long as the people denied access are nonemployees and they seek to communicate with customers.

The Company is mistaken, however, when it suggests that all of the pickets banished from the grounds of the Hempfield store were nonemployees. In fact, six of the twelve pickets who began their protest on May 23 were unquestionably "employees" under the Act. Two of them, Linda Kunkle and Peggy Black, were still actively employed by the store at that time. Four others— Debra Defibaugh, Sharlene Shotts, Sonja Welsh, and Lance Good—had been laid off in violation of section 8(a)(3). *See supra,* pp. 6-11. According to section 2(3) of the Act, an unlawfully discharged worker retains her status as an "employee". 29 U.S.C. § 152(3) ("The term 'employee' shall include any . . . individual whose work has ceased . . . because of any unfair labor practice . . . ."). We therefore must consider whether the Company violated the Act by refusing access to these six employees.

The Board found that the denial of access was impermissible because of *Babcock's* prohibition against discriminatory treatment of protected union activity. The Board's conclusion that the picketing in question was a protected activity subject to the *Babcock* analysis is clearly correct. Although *Babcock* itself concerned organizational rights, the Court has stated that the *Babcock* analysis extends to section 7 rights other than organizational activity. *See Sears,* 436 U.S. at 204, 98 S.Ct. at 1761. Picketing to protest unfair labor practices is such a right.

The Court has further indicated that "the 'locus' of the 'accommodation of § 7 rights and private property rights . . . may fall at differing points along the spectrum depending on the nature and the strength of the respective § 7 rights and private property rights asserted in any given context."' *Sears,* 436 U.S. at 204, 98 S.Ct. at 1761 (quoting *Hudgens v. NLRB,* 424 U.S. 507, 522, 96 S.Ct. 1029, 1038, 47 L.Ed.2d 196 (1976)). The specific characteristics of this case weigh toward granting access. First of all, the Board has labelled the right to protest unfair labor practices one of the "core" section 7 rights, along with the right to organize employees. *Jean Country,* 291 N.L.R.B. No. 4 at 5, 1988 WL 214053. Second, the pickets desired access only to the outside of the store.

Third, in this case, the Company's discriminatory behavior was particularly egregious. In particular, the Company invited at least three Steelworkers' representatives *inside* the store to recruit employees and to distribute authorization cards and contracts. This strikingly disparate treatment of the supporters of the two unions is a clear violation of the *Babcock* requirement that the Company's access rules "[do] not discriminate against the union by allowing other distribution." 351 U.S. at 112, 76 S.Ct. at 684.

Because the Company denied access to the six employee pickets while it permitted Steelworkers representatives to enter the Hempfield store to organize employees, we uphold the Board's finding that the Company's conduct constituted unlawful disparate treatment of protected union activity in violation of section 8(a)(1) of the Act.

VII. CONTINUED MAINTENANCE OF THE STATE TRESPASS SUIT

As we noted above, *supra p.* 4, on May 28, 1986, the Company acquired a state court injunction enjoining Local 23 from picketing on the Hempfield store grounds. On July 25, the General Counsel issued a complaint alleging that the Company had violated section 8(a)(1) of the Act by denying Local 23 access to the premises and by pursuing the trespass suit. Nevertheless, in the following months, the Company continued to maintain the lawsuit in state court. It enforced the injunction through the assistance of the county sheriff and obtained a state court order requiring Local 23 and four pickets to show cause why they should not be held in contempt of court for demonstrating on the sidewalk in front of the store.

The Board found that the Company had violated section 8(a)(1) of the Act by continuing to prosecute the lawsuit after the General Counsel issued the complaint. 306 N.L.R.B. No. 86 at 6, 1992 WL 41351. In reaching this conclusion, the Board relied on *Loehmann's Plaza*, 305 N.L.R.B. No. 81, 1991 WL 251696. In that case, the Board held that once the General Counsel issues a complaint alleging the unlawful exclusion of employees or union representatives from an employer's property, any state court lawsuit seeking to enjoin picketing or handbilling on the property is preempted by the Board's proceedings and by federal law. The

Company thereafter must take affirmative action to stay the state court proceeding. The failure to do so within seven days of the issuance of the complaint constitutes a violation of section 8(a)(1). *Id.* at 7-8 and 10, 1992 WL 41351.

The Company offers a purely legal challenge to the Board's finding of an 8(a)(1) violation in the present case. It contends that the NLRB's conclusion in *Loehmann's Plaza* that the General Counsel's complaint triggers preemption is contrary to Supreme Court precedent. In effect, therefore, we are being asked to review the *Loehmann's Plaza* decision.

Long ago, the Supreme Court held, "When an activity is arguably subject to Section 7 or Section 8 of the Act, the States . . . must defer to the exclusive competence of the NLRB if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959). The disagreements since then have focused on when an activity is "arguably subject" to the Act.

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978), the Court held that NLRB jurisdiction does not preempt state court jurisdiction if the union does not file a charge with the Board; otherwise, the employer would be left with no forum in which to adjudicate the dispute. *Id.* at 201, 98 S.Ct. at 1759-60. In such a situation, "[o]nly by proceeding in state court . . . could [the employer] obtain an orderly resolution of the question whether the Union had a federal right to remain on the property." *Id.* at 202, 98 S. Ct. at 1760.

Preemption thus cannot occur before the union files an unfair

labor practice charge. *Sears* left open the question, however, as to whether anything in addition to the filing of the charge is required to establish that the conduct at issue is "arguably" protected or prohibited by the NLRA and that state court jurisdiction is thus preempted. The majority in *Sears,* although it did not settle the question, strongly suggested that the union's filing of an unfair labor practice charge is sufficient in and of itself to trigger preemption. Justice Blackmun, in a concurring opinion, argued that the "logical corollary" of the majority's opinion is that state court jurisdiction is preempted once the union files a charge with the Board. *Sears,* 436 U.S. at 209, 98 S.Ct. at 1763 (Blackmun, J., concurring). In a separate concurrence, Justice Powell dated preemption later, at the time the General Counsel issues a complaint. *Id.* at 212-14, 98 S.Ct. at 1765-66 (Powell, J., concurring). The three dissenting justices, Justices Brennan, Stewart, and Marshall, asserted that there should be preemption even in the absence of a charge. *Id.* at 222-24, 98 S.Ct. at 1770-71 (Brennan, J., dissenting).

Of all the justices, Justice Powell thus advanced the most conservative approach, suggesting that a state lawsuit should not be preempted until the General Counsel issues a complaint. In *Loehmann's Plaza* the NLRB adopted the Powell approach, holding that "the General Counsel's decision to issue a complaint signifies that a showing has been made that the union picketing or handbilling is arguably protected by the Act, the substantive requirement of preemption." 305 N.L.R.B. No. 81 at 8, 1991 WL 251696.

It might well be legitimate to argue that the Board was wrong not to find that preemption is triggered earlier, by the filing of a charge. But in the present case, the Company takes an extreme position in the other direction, contending that *not even* a

complaint by the General Counsel is sufficient to establish that an issue is arguably covered by the Act and thus subject to exclusive NLRB jurisdiction. Not one justice on the *Sears* Court adopted such a stringent stance on preemption.

In support of its argument, the Company turns to the Supreme Court's decision in *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986). That case states:

> If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board . . . . The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

Id. at 395, 106 S.Ct. at 1914.

The Company argues that the issuance of a complaint does not satisfy this test. We find the Company to be patently wrong. As the Board pointed out in *Loehmann's Plaza* "[B]efore the General Counsel issues a complaint, he conducts an investigation in order 'to ascertain, analyze, and apply the relevant facts.'" 305 N.L.R.B. No. 81 at 8,1991 WL 251696 (citing NLRB Casehandling Manual). According to the Board's regulations, a complaint will issue only if "the charge appears to have merit." 29 C.F.R. § 101.8.

"If investigation reveals that there has been no violation of the Act or evidence is insufficient to substantiate the charge," no complaint will issue. 29 C.F.R. § 101.5. The Company cannot credibly contend that a claim that makes it through this gauntlet does not concern conduct "arguably" protected by the NLRA.

We find that the federal preemption is triggered by the issuance of a complaint by the General Counsel, if not earlier. We therefore uphold the Board's conclusion that the Company violated section 8(a)(1) of the Act by continuing to prosecute the state trespass case after the General Counsel had issued his complaint.

VIII. CONCLUSION

We uphold all of the Board's findings of unfair labor practices and its issuance of a bargaining order. We remand only so that the Board, for purposes of continuing representation, can determine the unit placement of any of the six employees whose status the Board did not previously determine who still work at the Hempfield store.

It is so ordered.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED FEBRUARY 27, 1992

SOR

306 NLRB No. 86

D--2586
Hempfield Township, PA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 6--CA--19076
6--CA--19159
6--CA--19428
6--CA--19388

DAVIS SUPERMARKETS, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL UNION 23, AFL--CIO--CLC

DECISION AND ORDER

On March 28, 1990, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Appendix B

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the remedy and recommended Order as modified.

1. The judge found that the Respondent unlawfully discharged six employees on April 19, 1986.[4] The Respondent excepts to the judge's finding that the Company had knowledge of the employees' union activity. In agreeing with the judge's finding that the discharges were part of a scheme to thwart the employees' organizing drive, we also rely on *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985), in which the Board stated:

> [W]e emphasize that it is the Respondent's mass discharge, and not its selection of employees for the discharge, that is unlawful.

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1. The Respondent's request for oral argument is denied as the record, the exceptions, and briefs adequately present the issues and the positions of the parties.

2. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

3. In finding that the Respondent unlawfully rendered assistance to the Steelworkers by urging its employees to join the Steelworkers and by permitting the Steelworkers to utilize its facility, the judge inadvertently stated that the Repsondent violated Sec. 8(a)(5) of the Act. The complaint alleges, and it is clear from his discussion, that the judge intended to find that the Respondent violated Sec. 8(a)(2).

4. All subsequent dates are in 1986 unless indicated otherwise.

> Accordingly, the General Counsel was not required to show a correlation between each employee's union activity and his or her discharge. *Pyro Mining Co.*, 230 NLRB 782 fn. 2 (1977); see *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985). Instead, the General Counsel's burden was to establish that the mass discharge was ordered to discourage union activity or in retaliation for the protected activity of some.

2. The complaint in Case 6--CA--19159 alleges that the Respondent "discriminatorily refused to permit the Union to picket and handbill on its Hempfield Township, Pennsylvania property, while permitting other organizations access to its property for purposes of soliciting its customers and related activities." For the following reasons, we find merit to the complaint allegation.

On May 23, the Union established a picket line at the Respondent's Hempfield store to protest the Respondent's unfair labor practices. The pickets, stationed on the sidewalk in front of the store, carried signs and distributed handbills to the Respondent's customers. The Respondent's president, Robert Davis, told the pickets they were not allowed on the sidewalk and threatened to call the police. On May 24, as a result of an injunction against the picketing obtained by the Respondent, the pickets were advised they could not picket on the sidewalk in front of the store. The pickets moved to the two parking lot entrances.

On the same day that the Respondent refused to allow the pickets to remain in front of the store, it permitted a charitable organization to set up a table on the sidewalk and sell raffle tickets for a car, which was parked in the lot in front of the store. Several employees testified that they have seen church and school

organizations in front of the store selling items to the Respondent's customers.

The Respondent asserts in its brief that the car raffle was only an isolated incident. The record evidence, however, is that the Respondent has allowed other organizations to solicit customers on the sidewalk immediately in front of the store. This testimony was not refuted by the Respondent at the hearing.

The judge found that the Respondent was enforcing its property rights selectively. The judge also, citing *Jean Country*, 291 NLRB 11 (1988), found that the Union's Section 7 right outweighed the private rights of the Respondent. The judge concluded that, by forcing the handbillers and pickets to leave the sidewalk, the Respondent violated Section 8(a)(1) of the Act.

We agree with the judge that the Respondent violated the Act by denying access to the Union, but we reach that conclusion solely because of the Respondent's disparate treatment of protected union activity. Although the Supreme Court in *Lechmere v. NLRB*, 111 S. Ct. 1305 (1992), rejected the Board's holding in *Jean Country*, the *Lechmere* decision does not disturb the Court's statement in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956), that "an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution." See also *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978). Here there is sufficient evidence that both before and during the time that the Union sought to picket in front of the Respondent's store, the Respondent allowed other organizations unlimited access to its property for sales and solicitations.[5] At the same time, the Respondent has

5. In addition to unrebutted testimony that the Respondent had permitted (Cont'd)

denied the Union the use of the same premises for handbilling and picketing purposes.[6] Under these circumstances, we find the Respondent's conduct constituted unlawful disparate treatment of protected union activity in violation of Section 8(a)(1) of the Act.[7]

3. As previously noted, the Union engaged in picketing and handbilling on May 23 on Respondent's property. On that same day, the Respondent filed a civil trespass complaint against the Union in the Court of Common Pleas of Westmoreland County, Pennsylvania. On May 28, the court enjoined the Union from picketing except for three pickets who were allowed at each entrance to the store parking lot. The Union ceased picketing, and in June the Union filed an unfair labor practice charge. On July 25, the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(1) by denying the Union access to the premises and by maintaining a civil trespass suit enjoining the Union from picketing.

On July 22, the Union again picketed at the parking lot

(Cont'd)
church and school organizations access to its property, we also rely on the fact that the Respondent permitted the Steelworkers to utilize its facility for union organizing purposes. See fn. 3, supra.

6. There is no evidence that the Respondent has a policy barring access to its premises by outside organizations. In *Lechmere*, by contrast, the Court observed that the respondent has established and consistently enforced a policy several years prior to the union's organizing efforts prohibiting solicitation or handbill distribution of any kind on its property.

7. We therefore find it unnecessary to engage in an accommodation analysis of the Sec. 7 and property rights. The judge's conclusions of law and recommended Order and notice accurately reflect the discriminatory nature of the violation we have found.

entrances. The Respondent threatened to have the pickets arrested and caused the Pennsylvania State Police to come to the store premises. On August 2, a sheriff's deputy handed the pickets a document indicating they were not longer allowed in the parking lot. On October 3, the General Counsel issued a complaint in Case 6--CA--19428 alleging that the Respondent, since on or about July 2, violated the Act by threatening to have persons engaged in handbilling arrested; causing the police to come to the store; and, through the asistance of the county sheriff, enforcing the injunction the Respondent had previously obtained.

On November 24, the Court of Common Pleas issued a decision dismissing the Union's claim that the court's action was preempted by the Board's proceedings. On November 26, the court, granting the Respondent's motion, ordered the Union and four former employees to show cause why they should not be held in contempt for allegedly violating the terms of the court's May 28 order.

We agree with the Judge that the Respondent violated Section 8(a)(1) of the Act by maintaining its civil trespass suit against the Union, but we do so solely for the reasons stated in our recent decision in *Loehmann's Plaza*, 305 NLRB No. 81 (Nov. 21, 1991). In that case, the Board held that once a complaint issues alleging the unlawful exclusion of employees or union representatives from an employer's property, any state court lawsuit concerning the question is preempted by the Board's proceedings and the continued pursuit of such a lawsuit violates Section 8(a)(1). As we stated in *Loehman's Plaza*, a respondent has an affirmative duty to take action to stay the state court proceeding following issuance of the Board complaint.[8] There is not evidence that the Respondent

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8. If it takes this action within 7 days, the Board will not find a violation. *Loehmann's Plaza*, supra at slip op. 10.

took any action to stay the court proceeding. On the contrary, the Respondent sought a contempt citation against the Union and the individuals.

We find that the Respondent violated Section 8(a)(1) by continuing to maintain the lawsuit, enforcing the injunction through the assistance of the county sheriff, and filing and maintaining a motion for an order to show cause and for civil contempt against the Union and four employees and seeking to enforce by fines and other penalties the aforementioned injunction after the General Counsel issued a complaint alleging that the Respondent unlawfully denied the Union access to its premises.[9]

4. The judge found that the Union represented a majority of unit employees at the Hempfield store when the Union requested bargaining. The Respondent excepts. The Respondent argues that the judge erred by excluding 23 employees and that including them in the unit would negate the Union's majority status. For the

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9. Under *Loehmann's Plaza*, supra, the Respondent's filing of the lawsuit and maintenance of the lawsuit up until the time the General Counsel issued a complaint did not constitute a violation of the Act, since no evidence has been presented that the Respondent's purpose in pursuing the lawsuit prior to the time the General Counsel issued his complaint was other than to protect, or at least to have adjudicated, its property rights.

In order to place the Union in the position it would have been in absent the Respondent's unlawful conduct, we shall order the Respondent to make the Union whole for all legal expenses, plus interest, incurred in defending against the Respondent's lawsuit after the July 25 issuance of the complaint in this proceeding.

We also agree with the judge that the Respondent violated Sec. 8(a)(1) by threatening to have persons engaged in handbilling on behalf of the Union arrested and causing the state police to visit the store.

following reasons, we agree with the judge's finding of majority status.[10]

The judge excluded from the Hempfield unit 11 employees employed at the Respondent's Greensburg store who were members of the Steelworkers, which represented a bargaining unit at the Greensburg facility. Although these employees worked for certain periods of time at the Hempfield store, where they performed the same work as they performed at Greensburg, they remained under the primary supervision of their Greensburg store supervisors and spent the majority of their working hours at the Greensburg store. These employees are in the Greensburg unit the Steelworkers represent and they are expressly covered by the existing collective-bargaining agreement between the Respondent and the Steelworkers. Under these circumstances, we agree with the judge that these employees should not be included in the Hempfield unit represented by the United Food and Commercial Workers Union.[11]

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10. On May 13, there were 108 employees in the bargaining unit. The judge found there were 107, but he inadvertently excluded employees Christner and Vallozzi, who were still employed on May 13, and included Michele Benson, who did not begin work until May 21. On May 24, there were 109 employees in the unit---Vallozzi had ceased working on May 16; Benson began work on May 21 and Hart on May 19. The judge found that the Union represented a majority (58 of 109) on May 24.

The Union's request for bargaining was made on May 13, but it was a continuing demand, still viable as of May 24; and, particularly in the context of the Respondent's unfair labor practices, it did not have to be renewed. See *Jimmy-Richard Co.*, 210 NLRB 802, 807--808 (1974); *Ed's Foodland of Springfield*, 159 NLRB 1256, 1262--1263 (1966).

11. See *Otasco, Inc.* 278 NLRB 376 (1986). We find it unnecessary to determine the unit placement of the five Greensburg employees who were not Steelworkers

(Cont'd)

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The judge excluded five college students and Tim Sheridan from the unit.[12] These employees worked almost exclusively during time periods traditionally associated with summer vacation and holidays. Their employement at other times during the school year was sporadic and intermittent, at best. We agree with the judge that, based on Board precedent, these employees should be excluded from the unit.[13]

Amended Remedy

To remedy the Respondent's violation of Section 8(a)(1) in maintaining a civil trespass suit against the Union after the Board issued a complaint, we shall order the Respondent to make the Union whole for all legal expenses, with interest as computed in *New Horizons for the Retarded*,[14] incurred after the July 25, 1986 issuance of the complaint in this proceeding in the defense of the Respondent's suit against the Union.

(Cont'd)

members. It is unclear from the record, including the questions framed by examining counsel, whether witnesses' use of the term "Steelworker members" was meant to refer to employees covered by the Steelworkers collective-bargaining agreement and whether the witnesses regarded nonmembers as individuals not covered by the agreement. We also find it unnecessary to determine that unit placement of Thomas Howard. Even assuming that these six individuals should be included in the unit, the Union still would have represented a majority on May 24.

12. The judge found that Sheridan's work pattern "corresponds" to that of a college student and excluded him from the unit.

13. See *Crest Wine & Spirits*, 168 NLRB 754 (1967).

14. 283 NLRB 1173 (1987).

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ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Davis Supermarkets, Inc., Hempfield Township, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(s) and reletter the subsequent paragraph.

"(s) Refusing to recognize and bargain with United Food Commercial Workers International Union, Local Union 23, AFL--CIO--CLC, as the exclusive bargaining representative of the employees in the appropriate unit."

2. Insert the following paragraph as 2(d) and reletter the subsequent paragraphs.

"(d) Reimburse the Union for all legal expenses, plus interest, incurred after the July 25, 1986 issuance of the complaint in Case 6--CA--19159 in the defense of the Respondent's lawsuit against the Union."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 27, 1992

Appendix B

James M. Stephens, Chairman

Clifford R. Oviatt, Jr., Member

John N. Raudabaugh, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix B

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate an employee regarding the employee's union membership, activities, and sympathies and the union membership, activities, and sympathies of fellow employees.

WE WILL NOT create an impression among our employees that their union activities are under surveillance by us.

WE WILL NOT solicit employee complaints and grievance thereby promising our employees increased benefits and improved terms and conditions of employment.

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WE WILL NOT threaten employees with store closure if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten employees with unspecified reprisals if they support the Union.

WE WILL NOT threaten employees that their union organizational activity is futile.

WE WILL NOT threaten employees by accusing them of disloyalty for supporting the Union.

WE WILL NOT make verbal announcements and, through the assistance of the Pennsylvania State Police, discriminatorily refuse to permit the Union to picket and handbill on our Hempfield Township, Pennsylvania property while permitting other organizations access to our property for purposes of soliciting our customers and related activities.

WE WILL NOT maintain a civil trespass suit against the Union in the Court of Common Pleas of Westmoreland County, Pennsylvania, which enjoins the Union from picketing on our Hempfield Township premises.

WE WILL NOT threaten to have persons engaged in handbilling on behalf of the Union arrested.

WE WILL NOT cause the Pennsylvania State Police to visit our above-decribed facility.

WE WILL NOT enforce, through the assistance of the Westmoreland County, Pennsylvania sheriff, the injunction we obtained as a result of the above-described civil trespass suit.

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WE WILL NOT file and maintain a motion for an Order to Show Cause and for Civil Contempt against the Union and our employees and seek to enforce, by fines and other penalties, the aforementioned injunction.

WE WILL NOT urge our employees to join the United Steelworkers of America, AFL--CIO--CLC and permit the Steelworkers to utilize our facility, thereby rendering aid and assistance to the Steelworkers.

WE WILL NOT change the work schedule of an employee thereby causing the employee's termination.

WE WILL NOT impose onerous terms and conditions of employment on an employee thereby causing the employee's termination.

WE WILL NOT unlawfully lay off our employees and refuse to recall the employees in retaliation for their exercising rights protected by the National Labor Relations Act.

WE WILL NOT unlawfully discharge an employee and refuse to recall that employee in retaliation for his exercising rights protected by the National Labor Relations Board.

WE WILL NOT refuse to recognize and bargain with United Food and Commercial Workers International Union, Local Union, 23, AFL--CIO--CLC, as the exclusive bargaining representative of the employees in the unit described below.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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WE WILL offer Deborah Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlane Shotts, Sonja Welsh, Larry Miller, Charles Miscovich, and Linda Kunkle immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantailly equivalent positions, without prejudice to their seniority or other rights or privileges and make them whole for any loss of pay they may have suffered by reason of our discrimination against them with backpay and interest thereon.

WE WILL remove and expunge from the personnel files of Deborah Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlane Shotts, Sonja Welsh, Larry Miller, Charles Miscovich, and Linda Kunkle all documents which relate to our actions which have been found to be unfair labor practices, and make whatever record changes are necessary to negate the effect of these documents and our unlawful actions.

WE WILL reimburse the Union for all legal expenses, plus interest, incurred after the July 25, 1986 issuance of the complaint in the instant proceeding in the defense of the lawsuit we brought against the Union.

WE WILL, on request, recognize and bargain collectively with United Food and Commercial Workers International Union, Local 23, AFL--CIO--CLC as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All full-time and regular part-time employees employed by Davis Supermarkets, Inc. at is Hempfield Township, Pennsylvania, location; excluding confidential employees,

students employed pursuant to cooperative education programs and guards, professional employees and supervisors as defined in the Act.

DAVIS SUPERMARKETS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1000 Liberty Avenue, Room 1501, Pittsburgh, Pennsylvania 15222-4173, Telephone 412--644--2929.

APPENDIX C — DECISION OF THE NATIONAL LABOR RELATIONS BOARD DATED MARCH 28, 1990

JD--65--90
Greensburg, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 6-CA-19076
6-CA-19159
6-CA-19428
and 6-CA-19388

DAVIS SUPERMARKETS, INC.,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL UNION 23, AFL-CIO-CLC

Barton A. Meyers, Esq. and *Patricia J. Scott, Esq.*, of Pittsburgh, PA, for the General Counsel.

Peter J. Ennis, Esq., John C. Pekar, Esq. and *Stuart A. Williams, Esq.* (*Eckert, Seamans, Cherin & Mellott*), of Pittsburgh, PA, for the Respondent.

Mr. Ronald Kean and *James R. Reehl, Esq.*, of Pittsburgh, PA, for the Charging Party.

Appendix C

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: Upon charges filed by the United Food and Commercial Workers International Union, Local Union 23, AFL-CIO-CLC, hereinafter called the Union or UFCW, beginning on April 29, 1986,[1] and as subsequently amended and supplemented,[2] complaints in the above-numbered proceedings were issued beginning on June 13, with the final amended complaint issued on December 18, 1987.[3] The complaints allege, collectively, that Davis Supermarkets, Inc., Respondent, violated Sections 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, as amended (Act) by (1) interrogating its employees regarding their union membership, activities and sympathies and the union membership, activities and sympathies of their fellow employees, (2) creating an impression among its employees that their union activities were under surveillance by Respondent, (3) soliciting employee complaints and grievances thereby promising its employees increased benefits and improved terms and conditions of employment, (4) threatening employees with store closure if they selected the Union as their

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1. All dates are in 1986 unless stated otherwise.

2. The charge in 6-CA-19076 was filed on April 29 and amended on June 12. The charge in 6-CA-19159 was filed on June 2. The charge in 6-CA-19428 was filed on August 18. And the charge in 6-CA-19388 was filed on August 4 and amended on August 13.

3. The complaint in 6-CA-19076 was issued on June 13. The complaint in 6-CA-19159 was issued on July 25. The complaint in 6-CA-19428 was issued on October 3 and amended on January 12, 1987. And the complaint in 6-CA-19388 was issued on October 24 and amended on May 6, 1987, and on December 18, 1987.

collective bargaining representative, (5) urging its employees to join the United Steelworkers of America, AFL-CIO-CLC (Steelworkers) and by permitting the Steelworkers to utilize Respondent's facility, rendered aid and assistance to the Steelworkers, (6) changing the work schedule of employee Charles Miscovich thereby causing his termination, (7) imposing onerous terms and conditions of employment upon employee Linda Kunkle thereby causing her termination, (8) failing and refusing to recognize or bargain with the Union as the exclusive collective bargaining representative of the involved unit,[4] (9) threatening employees with unspecified reprisals if they supported the union, (10) informing employees that their recall rights depended upon their refraining from activity on behalf of the Union, (11) threatening employees that their Union organizational activity was futile, (12) threatening employees by accusing them of disloyalty for supporting the Union, (13) laying off six named employees and refusing to recall said employees,[5] (14) discharging employee Larry Miller and refusing to recall him, (15) refusing to recall its employee Charlene Shotts to her former or substantially equivalent position of employment, (16) making verbal announcements and through the assistance of the Pennsylvania State Police discriminatorily refusing to permit the Union to picket and handbill on Respondent's Hempfield Township, Pennsylvania

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4. The unit set forth in the above-described complaint dated December 18, 1987, consists of the following employees:

"All full-time and regular part-time employees employed by Respondent at its Hempfield Township, Pennsylvania, location; excluding confidential employees, students employed pursuant to cooperative education programs and guards, professional employees and supervisors as defined in the Act."

5. Charlene Garris, Jennifer Hilty, Sharlane Shotts, Sonja Welsh, Deborah Defibaugh, and Lance Good.

property while permitting other organization access to its property for purposes of soliciting its customers and related activities, (17) maintaining a civil trespass suit against the Union in the Court of Common Pleas of Westmoreland County, Pennsylvania, Civil Division No. 3622 of 1986, which enjoins the Union from picketing on Respondent's Hempfield Township premises, (18) threatening to have persons engaged in handbilling on behalf of the Union arrested, (19) causing the Pennsylvania State Police to visit Respondent's above-described facility, (20) enforcing, through the assistance of the Westmoreland County Sheriff, the injunction it obtained as the result of the above-described civil trespass suit, and (21) filing and maintaining a motion for an Order to Show Cause and for Civil Contempt against the Union and four named employees[6] and seeking to enforce, by fines and other penalties, the aforementioned injunction.

It is asserted that the alleged unfair labor practices are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through representation cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.[7]

Respondent denies that it committed any unfair labor practices.

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6. Roy Biedrycki, Defibaugh, Randy Harshell, and Shotts.

7. It is alleged in complaint 6-CA-19388, by amendment dated December 18, 1987, that from on or about May 31 to on or about June 14, a majority of the unit designated and selected the Union as their representative for the purposes of collective bargaining.

Appendix C

A hearing on these consolidated cases was held before me in Greensburg, Pennsylvania on October 31, 1988, and on November1, 1988, through November 4, 1988, on November 7 through November 9, 1988, and on January 9 through January 12, 1989. Upon the entire record[8] in this proceeding, including the demeanor of the witnesses, and after due consideration of the brief filed by General Counsel and the Respondent in June 1989, I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Pennsylvania corporation with its principal office and place of business located in Greensburg and with a place of business located in Hempfield Township, Pennsylvania, is engaged in the retail sale of groceries. The complaints allege, the Respondent admits, and I find that at all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and UFCW and the Steelworkers have been labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Facts

Respondent is a family-owned corporation which at the time of the hearing herein operated a total of two grocery stores in

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8. General Counsel's unopposed motion, dated June 7, 1989, to correct the transcript is hereby granted. The five pages of corrections are set forth in Appendix A hereto.

Pennsylvania. The Hempfield facility was opened by Respondent in 1984. It is approximately 45,000 square feet and in 1986 there were, according to the testimony of Respondent's witnesses, about 120 to 150 employees on the payroll at this facility.[9]

Donald Porter, who at the time worked at a Shop and Save grocery store and was a volunteer organizer for the UFCW, started the involved organizing campaign by contacting Patty Pomaibo in the meat department of Respondent's Hemfield store in March. She gave him the names of Welsh and Shotts and their telephone numbers.

Welsh, who worked in the delicatessen (deli) department of Respondent's Hempfield store from April 1984 to April 1986, received a phone call at home in March 1986 from Porter. He asked her to attend a meeting at a McDonalds restaurant on March 24 regarding an attempt to organize Respondent's Hempfield store employees. Welsh went but she did not see Porter that evening.[10]

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9. The number of employees at the facility will be treated more fully below. The Greensburg store is approximately 65,000 square feet and, acording to Respondent's witnesses, it has between 150 and 175 employees. The two stores are 3 miles apart. Jim Davis, who is the president of Respondent, testified that between 12 and 24 employees have worked at both stores since the Hempfield store opened. By letter dated July 10, 1984, Respondent, at the UFCW's behest, provided it with the name and home address of each of its Hempfield employees, Respondent's Exhibit 19. Respondent also operated a store at Mount Pleasant, Pennsylvania and a store at Frostburg, Maryland. The employees at those stores were represented by the Steelworkers and another Local of the UFCW, respectively. According to the testimony of Jim Davis, neither the Mount Pleasant nor the Frostburg stores was closed because of labor costs.

10. Porter testified that he also asked Shotts to attend this meeting. Shotts coroborated Porter.

The following day he called her and asked her to talk to other employees about the Union and to attend a meeting the next day at his house. Welsh went with fellow employee Shari Curry and she and Welsh signed UFCW authorization cards at this meeting, General Counsel's Exhibits 27 and 13, respectively, dated March 26. Regarding the card, Welsh testified that she read it before signing it; and that Porter did not tell her that the only purpose of the card was to obtain an election.[11] Porter gave Welsh and Curry some UFCW authorization cards and told them what to tell other of Respondent's employees when they tried to get them to sign the cards. He emphasized that they should make sure the employees read the cards. Also, he asked them to get a list of names of Respondent's employees who might be interested. Welsh subsequently provided such a list.

According to Welsh's testimony, on March 25 her immediate supervisor, Sandy Reich, asked her if she heard anything about a union meeting that was supposed to take place at McDonalds the night before. Welsh assertedly said that she had heard about it but it

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11. Porter testified that he told Welsh and Curry that by signing the cards they could have Local 23 represent them at collective bargaining if they reached a majority; and that he did not threaten or pressure them to sign the cards. He sponsored Curry's UFCW authorization card, General Counsel's Exhibit 27, dated March 26, testifying that she read the card, filled it out and signed it in his presence. Porter also testified that he told Curry that if the UFCW had a majority of the cards it could demand recognition from the Respondent, and if it was denied, other avenues could be pursued, such as an election. As indicated below, Porter obtained a number of UFCW authorization cards. Regarding these, he testified that he never told an employee (1) that the only purpose of the authorization card was to obtain an election, (2) that they should not read the card or (3) that they should ignore what was written on the card. Also he asserted that he never threatened or promised anything in return for signing a UFCW authorization card. Included in the printed portion of the card is the following: "I hereby authorize the United Food & Commercial Workers, Local Union 23, AFL-CIO-CLC, to represent me for the purpose of collective bargaining."

did not have anything to do with her. Welsh testified that this conversation took place by the stove in the kitchen in the deli department; and that Rich seemed to be a good friend.

Subsequently, Welsh talked with other employees about the UFCW and she distributed authorization cards to the following of Respondent's Hempfield employees: Anita Mattucci, Good, Cathy Vesco, Judy Barbrow, Ken Buhl, Shotts, Mary Olshefskey, Pam Barnes, Gail (Welsh could not recall her last name but remembered that she was from the post office.) and Patty (from the meat department).[12] Welsh received Mattucci's signed UFCW authorization card from her in the deli, General Counsel's Exhibit 14. Barbrow also gave Welsh her, Barbrow's, signed UFCW authorization card, General Counsel's Exhibit 15. And Welsh received signed UFCW authorization cards from Shotts, who also gave Welsh Olshefskey's card, and Good, who also gave Vesco's card to Welsh. Welsh testified that she did not believe that anyone in managment saw her distribute or collect the cards and she never discussed the Union with anyone in managment.

In the beginning of April, John Shumaker, a baker at Respondent's Greensburg store, came to the Hempfield store to bake. Defibaugh was told that he was coming to Hempfield so that she could go on daylight. Janet Barbour, who was a cake decorator at Greensburg, came to the Hempfield store about once a week beginning in early April or in March. This practice was discontinued, according to Defibaugh, after about a month.[13]

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12. Welsh testified that during a break or while she was out of the store after work, she would put the UFCW authorization cards in a plain piece of paper and hand them to the employees and she told them to read them and if they wanted the Union to sign them and hand them back to Porter or her.

13. Since Defibaugh was laid off on April 19, apparently this practice began sometime in March.

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Hilty, who worked at Respondent's Hempfield store from February 19 until April, testified that another employee at the store, Curry, gave her a UFCW authorization card which she, Hilty, signed. Assertedly, Curry told her to read the card. The date on the card is as follows: "April 1986." Hilty testified that she signed the card in early April[14] and that she read it prior to signing it.

On April 7 Porter entered respondent's Hempfield store, went to the meat department and spoke with Garris. She had been employed at Respondent's Hempfield store since February 10. Porter asked her to meet him after work.[15] Garris testified that Jim Davis' second floor office was located across from the meat department on the other side of the store; and that someone in the office could see the meat department through one-way glass. Garris did not know if there was someone in the office at the time. She and Porter eventually met on April 16.

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14. Hilty also testified that it could have been around April 7.

15. Porter testified that one time when he was in the Respondent's Hempfield store Mowery, who was the store manager, came up to him and asked him if he needed any help and he said "no"; that Mowery followed him while he was in the store and eventually Mowery said:

"Well maybe you might need some help getting your ass the hell out of this store. I know what you are up to. Local 23 is trying to get into this store and the Davis' would do anything to prevent this even if it meant kicking your ass."

At one point on cross-examination, Porter testified that he believed that this occurred sometime after he met with certain of Respondent's employees on May 6, as described below. At another point he testified that he had no idea of the date when this occurred. And finally, on redirect Porter, after refreshing his recollection with his affidavit to the National Labor Relations Board (Board), testified that this occurred early in the campaign in either April or May.

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Shotts signed her UFCW authorization card on April 9, after reading it, General Counsel's Exhibit 60. Welsh gave her the card. Shotts returned the card to Welsh, along with a card she, Shotts, solicited from Olshefskey, dated April 3, General Counsel's Exhibit 61.[16] Shotts testified that she told Olshefskey to read the UFCW authorization card before signing it and that it was "for getting a union in." Shotts also asked employee Melaine Vallozzi if she was interested in signing a UFCW authorization card. Vallozzi declined.

On April 14, Respondent's employee Jody Cusano signed a UFCW authorization card, General Counsel's Exhibit 28. Porter testified that he told Cusano that she would be authorizing the Union to represent her in collective bargaining; and that she read the card, filled it out and signed it in his presence.

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16. About 1 year before she signed the UFCW authorization card, she asked Dick Shebilsky, who assertedly was her manager in the meat department, and Jeff Toffolo what they thought about getting a union into the store. Allegedly they said "Don't even think about getting a union in the store. We don't want a union in here. Don't even talk to anybody about it or you won't be employed here anymore." At that time Shotts had the Steelworkers in mind but she did not find any support among her fellow employees. Regarding Shebilsky and Toffolo, Shotts testified that Shebilsky ordered meat, prepared meat to be wrapped, cut meat, and checked the meat inventory in the case when he decided which meats had to be stocked; that Toffolo cut meat, ordered meat, ground meat, made hot sausages, made out the schedules (According to Shott's testimony, sometime early in 1985 Shebilsky told Toffolo that he should handle the scheduling.), hired employes for the meat department, handled employee problems in the meat department, and handled the day-to-day direction of the employees in the meat department; and that the two attended the regular department managers' meetings on a rotating basis, and neither to her knowledge punched a time clock.

Toffolo testified that he did not recall having a conversation with Shotts about the possibility of a union organizing the Hempfield store.

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Hilty's last day of work at Respondent's Hempfield store was April 15. She testified that on Tuesday, April 15, she filled in for someone else who was sick; that she was off the next two days; that she was supposed to work on Friday, April 18, but she was sick; that she called in and spoke to Mattucci who said that she would speak to another employee about filling in for her; that later she telephoned her department, the delicatessen, but there was no answer; that subsequently her supervisor, Sandy Reich, telephoned her and told her that she had been taken off the schedule because she supposedly had said something to a customer; that Reich refused to tell her what it was she said; that Reich said that it had nothing to do with calling off sick; that Reich said that she, Hilty, "was not going all out for it"; and that Reich said that she would give her a reference in the future if she needed it. Assertedly, when she was hired in February, Hilty was told that there would be a 30-day probationary period. After signing the UFCW authorization card, Hilty did not wear anything which would indicate that she supported the Union and she did not attend Union meetings. On cross-examination, Hilty testified that she did not remember any conversation with Reich around the first of April about Hilty's performance; that Reich never indicated to her that she called off to many days; that Reich never told her about a customer who wanted fresh cut meat and not the meat in the counter near closing time; and that Reich never told her that certain meats and cheeses were left unwraped and the counter was not cleaned the way Reich expected it to be cleaned.

Louise Elda, who is a manager at the Hempfield store, Toffolo, Sandy Reich, Mowery and Jim Davis testified that they did not know that Hilty signed a UFCW authorization card or supported the UFCW or engaged in Union activities on behalf of UFCW prior to the end of April 1986.

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Sandy Reich testified that Hilty did fairly well for up to 6 weeks after she was hired. Subsequently, according to Reich's testimony, Hilty's work deteriorated in that she left things undone and she left the counter area messy and dirty. Assertedly, Reich discussed these problems with Hilty. Also, Hilty, according to Reich, had a problem with calling in sick. Assertedly, Reich also discussed this with Hilty. Reich terminated Darla Smith at the same time. Reich could not remember if Hilty and Smith had switched assignments or if both of them had called off.[17] She, Reich, testified that she was unhappy with their performance at the beginning of the week and she decided at the end of the week taht she was going to terminate the two of them.[18] Allegedly, Smith was a slow learner. Reich testified that she did not discuss these terminations with any other manager in the store, including Mowery and Jim Davis.[19]

Garris signed a UFCW authorization card on April 16 at her home and gave it to Porter, General Counsel's Exhibit 23. She read the card before signing it. Porter testified that he told her by signing the card she was authorizing Local 23 to represent her in collective bargaining. She told co-worker Shotts, either the next day or the following day, that she had signed an authorization card.[20]

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17. Reich testified that it was her policy to have employees discuss switching assignments with her before they made the switch. While Rich has issued written warnings to employees, she never issued written warnings to Hilty or Smith.

18. Reich testified that she did receive customer complaints about Hilty's attitude.

19. Reich testified that she had fired an employee in the past without consulting with anyone else.

20. Garris testified that she did not engage in any other Union activity and she did not discuss the UFCW with anyone in management.

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Defibaugh, who worked in Respondent's Hempfield store from April 1984 until April 19, signed a UFCW authorization card on April 16. Defibaugh testified that she read the card before signing it and no one told her not to read it or to disregard what was written on the card. She gave her signed card to Porter, who came to her house. Defibaugh spoke about the Union with employees Good, John Dick, Steve Napoleon and Buhl, indicating that if they wanted the Union to represent them they could sign a card. Buhl subsequently told her that he had been offered a co-manager's job in the store so he was not going to sign a UFCW authorization card. Defibaugh was hired at the involved store as a baker. In September 1984 the bakery manager in the department was let go. Defibaugh assumed his responsibilities but she did not receive any title or additional pay. She mentioned this to Jim Davis and Pat Garlits, who is the manager of the bakery department and who worked out of the Greensburg store, in November 1984. They agreed to give her the title and a 30 cents an hour raise. So while the other employees in the bakery were making $3.70 an hour, she was making $4.00 an hour.[21] Defibaugh never held meetings of the

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21. Her duties consisted of baking from 3 am until about 8 am. Then she would order frozen product and cakes from Respondent's Greensburg store. Basically, the same amount of product was used every week, except for increases during holidays and the summer. Defibaugh decided how much product had to be ordered. She checked off what she needed on a printed list. When she was not working, Good did the ordering. Good testified that a lot of times he and Defibaugh did the ordering together with one of them taking the inventory and the other one writing the items down. If an order came in that day from Greensburg, Defibaugh and Good would put the frozen food away in the freezer. Starting at about 5 am the employees who worked in the bakery would start to arrive at work. Each employee would have a set job. Once a week, toward the end of her workday, she would make up the work schedule for the approximately 15 bakery employees for the following week, "a very routine matter." Mowery or Elda would tell her how many total hours she could schedule for the following week. Each employee in the bakery department worked basically the same

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bakery employees, she did not receive a salary but rather was paid on an hourly basis and she punched a time clock. She testified that she never attended the regular management meetings[22] and she did

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(Cont'd)
hours, except around holidays and Sundays would be rotated. Defibaugh also would attempt to accomodate requests from employees regarding days off, etc. Mowery only reviewed the schedule she made up around holidays. If she believed she needed more hours she had to ask Mowery or Elda. If she believed that she needed more help in the bakery she would tell Garlits or Mowery and they would have someone temporarily transferred into the bakery. Defibaugh interviewed a couple of applicants and she recommended whether they should be hired. She participated in one interview with Elda, and she conducted the other interview by herself. Regarding the former, both agreed that the applicant should not be hired. With respect to the latter, she recommended that the applicant be hired and she was not. Once, in January or February 1986, Defibaugh was told by Mowery to write up a bakery employee for not doing her job. Also, Defibaugh complained to Mowery about an employee who was taking to much time off. This was the extent of Defibaugh's disciplinary actions. She did not have authority to change the assignment of bakery employees. Usually she discussed such matters with bakery manager Garlits. While she talked to outside salesmen, she could not order any new product but rather she referred the salesmen to Garlits. Additionally, she did not select the bakery items to go on special for the week but rather Garlits told her which items to put on special. Other than what Mowery told her about how the bakery was doing financially, she had no access to financial information regarding the bakery department. Defibaugh testified that she had overall responsibility for the bakery department at the Hempfield store.

Good testified that around the end of 1985 Defibaugh told him and John Dick that she was made bakery manager; that he did not recall Defibaugh giving directions to bakery workers; that she did the scheduling in the department; and that when he called off he spoke with whoever answered the telephone. Elda, Toffolo and Mowery included Defibaugh in naming the managers at the Hempfield store.

22. James Blaser, who worked for the Respondent since 1984, testified that the affidavit he gave to the Board in 1987 correctly indicates that he works in Hempfield on Wednesdays for 4 or 5 hours to replace managers who attend the managers (Cont'd)

not believe that the managers who did punched a time clock.

On April 16 Defibaugh attended a meeting in Mowery's office. Garlits and Shumaker were there also. Mowery and Garlits asked Shumaker how the employees in the Hempfield store bakery

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(Cont'd)

meetings in Greensburg. Elda testified that between January and August 1986 there were not weekly or monthly meetings of all managers; that during this period of time she did attend meetings where more than one manager was present but such meetings were rare. Toffolo testified that between January and August 1986 there were not regularly scheduled weekly or monthly meetings of the store managers; and that he did attend meetings, perhaps once a month where there was more than one manager present. He testified that such meetings occurred "[v]ery rarely"; and that the meetings he attended related to ads and only Jim Davis was present. Sandy REich testified that while in 1985 there were no weekly or monthyly meetings of managers, she did attend meetings during this period when me than one manager was present; that such meetings occurred once a week or every two weeks and advertising and competiton were discussed; that the meetings were held in the Hempfield store and Jim Davis and Mowery were present; that sometimes there were managers from other departments at these meetings; and that she did not remember Defibaugh ever attending these meetings. Mowery testified that there were no weekly or monthly meetings scheduled for all managers to attend during thsi period of time; that between January 1986 and the Friday of Memorial Day weekend, 1986 he attended a total of 10 meetings at which other managers in the store were present; that these meetings concerned advertising; that Jim Davis and Sandy Reich also attended all of the meetings; that other department heads who sometimes attended these meetings included John Panichella, who is the produce manager at the Greensburg store (Allen Barber, the produce manager at Hempfield, did not attend.), Jeff Toffolo was at one meting and Elda was at one meeting; and that Garlits would represent the bakery department at these meetings. In comparing the duties of Defibaugh and Civiccio, an admitted supervisor, Mowery testified that she made out the schedule for the cashiers and packers, the front end people, she granted requests for days off, she did not purchase anything for the store, and she did not hire but she did advertise for job applicants, conduct initial interviews and refer applicants to Mowery with her comments on the individual. Also, when Mowery and Elda were not present CIviccio would be responsible for the whole store.

were doing. Shumaker indicated that Barbrow was slow at her job; that Tami Roadman was not doing her job; and that Good had a bad attitude. Defibaugh indicated that Barbrow was nervous about doing the cake decorating in front of a window where customers could see her, and that Good did not have a bad attitude but he thought he should be paid more for the job he was doing. Good testified that Defibaugh told him about the meeting and the fact that Shumaker said something about him having an attitude problem. Good had never been warned by anyone in management about having an attitude problem.

On April 17 Respondent's employee Gail Horsley signed a UFCW authorization card, General Counsel's Exhibit 30. Porter testified that he told Horsley that she would be authorizing the Union to represent her in collective bargaining; and that she read the card, filled it out and signed it in his presence.

Good, who worked in the bakery department at Respondent's Hempfield store since 1984, signed a UFCW authorization card on April 17, General Counsel's Exhibit 58. He read it before signing it. He also solicited the card of another bakery employee, Vesco, dated April 17, General Counsel's Exhibit 59.[23] Good testified that he told Vesco that if a majority of the employees at the store signed UFCW cards, than the Union could bargain for them, and if not, there could be a possible election. He also testified that Shumaker was in the area when he handed the cards to Welsh but he did not know if Shumaker saw what was going on; that the employees in the bakery talked about the Union in Shumaker's presence but Shumaker never participated in the conversations; that Defibaugh "talked pro union a lot"; and that he never wore any insignia that indicated that he supported the UFCW.

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23. As noted above, Welsh gave Vesco the card but Good returned the Vesco card to Welsh.

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According to her testimony, on April 17 Shotts asked Mowery if she could take a leave of absence during he summer months since her children were getting out of school for the summer and she could not afford a baby sitter. Assertedly, Mowery said that he would speak to Jim Davis.

Jim Davis told Shotts on April 18 that he could not grant her request since he could not grant a leave of absence to everyone who wanted one.

Defibaugh received a telephone call from Garlits on the morning of April 18. He told her to take Good, Barbrow, and Roadman off the schedule. Defibaugh went to Mowery and told him that she thought that it was too many people to lay off at one time. Mowery said that Roadman would be laid off, and that he was surprised about Good but he had been told that Good was being laid off because of his attitude. Mowery indicated that Good had never been warned or written up about his attitude. Mowery said to leave Barbrow on the schedule and the following week they would let her go, and to leave Roadman on the schedule until Tuesday so that she could be told about being laid off.[24] Later that afternoon, Defibaugh went to Greensburg to speak to Garlits about the layoffs. Garlits said that he was surprised about Good because no one had ever told him that Good had a bad attitude. Garlits also said that "they said to . . . take those three people off the schedule, that he was told that they were to be taken off." Defibaugh testified that Garlits did not say who directed him to take this action other than specifying "they."

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24. Subsequently Defibaugh testified that at this meeting Mowery and she settled on what to do regarding Roadman but they did not settle anything about Barbrow.

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Assertedly, around 8 am on April 9 Defibaugh asked Elda why they were letting Good go. Defibaugh testified that Elda said:

> Well I guess I can tell you. Jim wants him laid off, not fired. That they heard the union was getting close to the number they needed for an election and they were getting rid of the troublemakers and people with attitude problems.

Defibaugh also testified that the only "Jim" Elda could have been refering to was Jim Davis; that when Elda asked her if she knew about the Union, she said "no"; and that she was friendly with Elda.

Elda, Toffolo, Sandy Reich, Mowery and Jim Davis testified that they did not know that Good signed a UFCW authorization card, supported the UFCW or engaged in Union activity on behalf of the UFCW up to the time he was laid off. Elda testified that at no time prior to Good's discharge did she have a conversation with Defibaugh about the discharge.

According to Defibaugh's testimony, after she talked to Elda on April 19, Defibaugh told Good that he was being laid off.

Good testified that Defibaugh told him the following: "I can't believe I have to do this but they told me to get rid of you"; that Defibaugh told him that he wasn't fired but that he was laid off, and that the reason Davis had to get rid of him was that he assertedly had an attitude problem.

Around 9:30 am on April 19 Defibaugh spoke with Mowery indicating that she had told Good about the layoff. She testified that Mowery understood that she felt bad about letting Good go

because he always did his job, and that no one could understand why he was being let go.

Later that morning Defibaugh went to Mowery to discuss the employees scheduling. Mowery was talking with Napoleon, who stocked shelves, and Mowery would not let Defibaugh into his office so she asked him to call her when he finished talking with Napoleon.[25]

About 1 pm on April 19, as she was getting ready to leave work, Defibaugh received a telephone call from Elda who told her that Mowery wanted to see her before she left. Mowery, with Elda present, told Defibaugh that business was slow and that they were going to try to combine the two stores and make it one unit and that was the reason that she was being laid off. Defibaugh testified that she told Mowery that she did not believe that they would lay of somebody with more seniority than other employees in the bakery department, especially when some of these other employees caused problems and did not do their work. Also, she told Mowery that in the springtime business starts picking up and it did not seem like the right time to be laying people off.[26]

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25. As noted above, Napoleon was one of the employees Defibaugh spoke to, indicating that if they wanted the UFCW to represent them they could sign a UFCW authorization card. And as noted below, Napoleon was one of the individuals who photographed picketers.

26. Regarding her Union activities, Defibaugh testified that before she was laid off she did not (1) distribute Union literature, (2) wear any Union buttons, or (3) wear anything which would identify her as a UFCW supporter. Regarding customer complaints concerning the Hempfield bakery, she testified that they did have cakes coming down from Greensburg and in the transportation the decorations were damaged; that she complained to Greensburg that the frozen donuts they sent down had thawed and been refrozen; that she complained to Garlits about the fact that there

(Cont'd)

Appendix C

Elda, Toffolo, Sandy Reich, Mowery and Jim Davis testified that they did not know that Defibaugh signed a UFCW authorization card, supported the UFCW or engaged in union activity on behalf of the UFCW before she was laid off.

When she arrived home on April 19, Defibaugh telephoned Garlits and asked him why she was being laid off. She testified that he said that he did not know.

Later that afternoon, Shumaker called Defibaugh at home indicating that he had been told to work on Sunday April 20 and that Garlits said that she had walked off the job.

Mowery testified that he first learned of Defibaugh's lay off when Jim Davis telephoned him and told him that he was going to consolidate the bakeries at the Greensburg and Hempfield stores and he should lay off Defibaugh; that he was not aware at that time that there were other layoffs in the bakery department; that this was the first he heard of a consolidation involving a layoff of Defibaugh; that Jim Davis said we are merging the bakeries, tell Defibaugh we're going to lay her off; that Jim Davis did not tell him how the merger was going to come about, what it would mean, whether it would involve other departments or how to replace Defibaugh regarding her non-manager functions; and that normally department managers handle layoffs.

Jim Davis testified that he made the decision to let Defibaugh and Good go; and that he did it"[b]ecause we had problems in the bakery."

(Cont'd)
was a surplus of stale cookies, which were being saved to make cookie dough; and that the surplus existed because she was told by Jim Davis not to allow the shelves to be empty.

Appendix C

On April 19, after she had returned home from work, Welsh was telephoned by Sandy Reich who asked Welsh to come back to the store. Reich told Welsh that she was being laid off. Welsh testified that when she asked Reich why, Reich said "I really don't have a reason. I can't tell you. When you are a manager, you are kind of like a puppet, you do whatever they tell you to. I really don't want to do this, but I have to do it." Reich also told Welsh that if she needed a recommendation for a job she would give Welsh the highest recommendation and if she could get Welsh back, she would. When Welsh asked Reich if it had anything to do with the Union, Reich assertedly answered "I really can't tell you." Welsh could not recall Reich saying anything about the consolidation of the Greensburg and Hempfield delicatessens. Welsh testified that she was the most senior of the 10 employees in the deli department.[27] She also testified that up to the time of her layof, she had not worn any Union button identifying her as a UFCW supporter and she never wore any other insignia which would indicate that she supported the Union. Also, she had not distributed any Union material other than the cards.

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27. Welsh, who was primarily the deli cook, testified that she was never criticized about her work performance, she never received a verbal or written warning, and she was never suspended. Welsh did not recall any discussions with Sandy Reich regarding problems with the preparation of food in the deli and she did not recall Reich indicating that customers were complaining.

When she checked the schedule that morning, the name of Darla Smith and Hilty were not on it. Welsh testified that Hilty missed a lot of work and Reich was upset with her because it was difficult to get someone to replace her. Pauline Wigfield, from Respondent's Greensburg store, was on the schedule. Welsh testified that before she was laid off she was not aware of anyone from the Greensburg store working in the Hempfield deli. When she later returned to the store to shop, Welsh noted that at first Wigfield was doing her job and than Mattucci, who signed a UFCW authorization card gave it to Welsh, did Welsh's job.

Appendix C

Elda, Toffolo, Sandy Reich, Mowery and Jim Davis testified that they did not know that Welsh signed a UFCW authorization card, supported the UFCW or engaged in union activity on behalf of the UFCW before she was laid off.

Sandy Reich testified that she and Welsh prepared food in the deli kitchen until about October 1985; that to her knowledge there were no complaints about the food prepared in the deli kitchen up to that point in time; that in October 1985 she assumed more responsibility and ceased cooking in the deli kitchen; that thereafter Welsh did about 95 percent of the cooking; that in November 1985 she began receiving numerous complaints that customers were upset that items were not of the same consistency as at the Greensburg store[28]; that she told Welsh that she was laying her off because Respondent was consolidating the Greenburg and Hempfield stores and people from Greensburg would be coming to the Hempfield store to do part of the cooking[29]; that Welsh said that

28. More specifically, Jim Davis told her that customers complained that the chicken noodle soup was too salty and that the pieces of potato in the potato salad were not uniform in size. Reich testified that there might be two such complaints a month and Welsh made an attempt to conform to the requests Reich made. When Jim Davis told her to let Welsh go he indicated that Welsh was not preparing the food the way it should be prepared and he had given Welsh long enough to do it correctly. Reich testified that she disagreed with Jim Davis' assessment and told him so at the time. She told Davis that Welsh was carrying most of the workload herself and she tried very hard to complete her jobs as quickly as she could, she was a good employee, she never called off work, she never complained, and she tried very hard to do everything that Reich asked her to do.

29. Reich testified that prior to Jim Davis telling her to let Welsh go, she, Reich, had heard nothing about a consolidation or a merger plan between the Greensburg and Hempfield stores and she was not questioned about which employees she thought she could do without. Reich testified that Ann Howard, Eileen Hribal (Orange), Robin Myers, Carol Pyle, Sandra Wilkinson and Wigfield worked in the deli department at both of respondent's stores. Howard, Wilkinson and Wigfield, along with Reich, did the cooking after Welsh left.

she did ot believe the reason Reich gave; that Welsh asked her if it had anything to do with the Union and she told Welsh that she did not know what she was talking about[30]; and that she did not ask Welsh anything about the Union or about her Union activities.

Jim Davis testified that he decided to let Welsh go because Respondent was having problems in the deli with the food being prepared; and that he later agreed to let Reich recall Welsh.

On April 19 Garris was told to telephone her supervisor, Toffolo, later since the schedule was not yet posted when she left work. When she telephoned Toffolo, he said that Davis was having some money problems and they had to lay off some people, including her. When she asked if the layoff was temporary or permanent he told her to call back on Monday. She did not. Garris had the least seniority of the people who worked in the meat department. Garris testified that Shots was also laid off at that time; that prior to that time there were no employees from Respondent's Greensburg store who worked in the Hempfield meat department; and that at the time; that prior to that time there were no employees from Respondent's Greensburg store who worked in the Hempfield meat department; and that at the time, a co-worker had given 2 weeks notice that she was quitting. While Garris conceded that she has priced meat incorrectly and that possibly Toffolo may

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30. Reich testified that before this she had heard nothing about the Union and while she discussed Welsh with Jim Davis after she left, Reich did not tell Davis about Welsh's comment regarding the Union. Also, Reich testified that when Jim Davis said that Welsh was not following the recipes she told him that she did not agree with him. Between April 19 and Memorial Day 1986, Reich asked Jim Davis every time she had the opportunity, to bring Welsh back. Reich testified that she told Jim Davis that she wanted Welsh back and that Welsh was a good employee and given the opportunity Welsh could do what she was supposed to do.

have discussed this with her, she asserted that Toffolo would also have discussed this with the other women in the meat department since they all priced the meat.

Elda, Toffolo, Sandy Reich, Mowery and Jim Davis testified that they did not know that Garris signed a UFCW authorization card or supported the UFCW or engaged in Union activities on behalf of UFCW prior to the end of April 1986.

Toffolo testified that Respondent was having a slow period in the meat department at the Hempfield store and he did not have enough payroll hours to go around; that he decided that he would have to let two people go[31]; that he chose Garris because she was the newest hire in the department and she was having a tough time catching on to the system[32]; that Garris was not laid off but rather she was discharged; that he did not believe that the Respondent kept the type of records at that time as to the alleged slowness; that he told Jim Davis that he, Toffolo, had to cut back on his work force[33]; and that part of the reason was that the meat department

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31. Toffolo also testified that he has the authority to hire people for the meat department but he usually clears it with Jim Davis or Virginia Brady, the personnel supervisor at the Greensburg store.

32. There is no documentation to demonstrate that she was not doing her work properly or adequately. Toffolo testified that Garris had completed her 90-day probationary period and she was pricing meat wrong on a regular basis. Assertedly, he had talked to her three or four times about the problem.

33. Toffolo testified that he punched out a tape himself from the compute rwhich showed, on a weekly basis, his sales for the meat department; and that from the end of March through the first few weeks of April the meat department had too many hours. With the departure of Garris and Shotts, the meat department employee hours were reduced by about 20 to 25 hours because some of Garris's and Shotts' hours were redistributed among other employees in the meat department.

had become more efficient because the systems were becoming more streamlined throughout.

Shotts testified that Toffolo told her on April 19 that he heard that she wanted a leave of absence; that he then asked her if she would consider a lay-off and she said that she would have to talk to her husband; that Toffolo said that he had to know then because he was "getting rid" of two female employees in the meat department; that she said that the only way she would consider a lay-off would be if she would be able to come back to work, and he said that there would be no problem with that; that after work that day she returned to the store at the behest of Toffolo to meet with Mowery, Shebilsky, Toffolo, and Elda; that Mowery told her that instead of giving her a leave of absence it was decided to give her a lay-off which would help her over the summer to get extra money; that Mowery said that she was a good worker and it would be no problem for her to come back to work when her children went back to school at the end of the summer; that the lay-off was to start immediately; and that before her layoff she did not wear any union buttons or insignia which would indicate that she supported the UFCW, and she did not discuss the Union drive with anyone in management.

Elda, Toffolo, Sandy Reich, Mowery and Jim Davis testified that they did not know that Shotts signed a UFCW authorization card, supported the UFCW or engaged in union activities on behalf of the UFCW before she was laid off.

Toffolo testified that he told Shotts that he could let her go so she could collect unemployment; that Shotts said that she would check it out with her husband and get back to him; that when she got back with him she said that it sounded like a good idea; that when she and he met with Mowery regarding this matter, Shotts

asked if it would be permanent "and we told her that there was no guarantee of a job being here at some later point in time"; and that Shotts was not laid off but rather she was "discharged"; and that after the terminations in the meat department some employees in Respondent's Greensburg store came to work in his department.

Mowery testified that he was present with Jim Davis when Shotts asked him if she could take a leave of absence so she could be home with her children because her husband was called back to his job; that Davis told her that he could not do it; that subsequently Toffolo told him that he had to "lay off" two people from the meat department and Shotts agreed to be laid off; that he and Toffolo met with Shotts and he and Toffolo explained that she would be granted a "lay off" but under no circumstances would she be guaranteed her job back anytime she wanted and there would have to be a need for her to come back; and that as she was leaving, Shotts said that if the meat department needed help or the store needed help, they should feel free to call her.

On April 21 Defibaugh telephoned Garlits and asked him if he had found out why she had been laid off. When he said "no," she told him that she was going to call Jim Davis.

Defibaugh telephoned Jim Davis at the Hempfield store. She told him who she was and asked him why she was being laid off. Defibaugh testified that Davis said that he could not hear her since the phone wasn't any good, and he asked her to give him her telephone number and he would get to another phone and call her right back. He did not. Defibaugh did not have to repeat the telephone number more than once to Davis. Defibaugh then telephoned both the Hempfield and Greensburg stores and was told each time that Jim Davis was at the other store.[34] Around noon

34. In an affidavit she gave to the Board on May 16, Defibaugh indicated that (Cont'd)

Garlits telephoned her and first asked her if she knew why she had been laid off. When she said no, he said that business was slow and apparently they are going to consolidate the two stores and they are just laying some people off right now. She told him that she did not believe that and that he should tell Jim Davis that she did not believe it. Garlits agreed with her that he could not understand why she was being laid off. He told her that he would give her a reference.

On or about the evening of April 23, Shotts telephoned Shebilsky at home. She had received a telephone call from Pomiabo who wanted to know what was going on since assertedly 12 employees left the Hempfield store on April 19. Shotts said that she did not kow what was happening. Subsequently, she received a telephone call from Defibaugh who asked her if she would sign a deposition since a number of Respondent's employees were laid off assertedly because they signed Union authorization cards. She refused, indicating that that was not the reason for her lay-off. Shotts asked Shebilsky if she got laid off because she signed a Union card. He said "[n]o, I don't know anything about what is going on." Assertedly, he also said that she should not sign the deposition or she would never get her job back.

Harshell, who worked for Respondent at its Hempfield store on its night crew stocking shelves from January 1985 until July 1986, signed a UFCW authorization card on April 23, General Counsel's Exhibit 62. He testified that he read the card before signing it and that when Porter gave it to him he just said it was to

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(Cont'd)
when she telephoned Jim Davis at Hempfield and asked him why she was laid off, he told her to call Garlits because he knew. She then told Davis that she had just talked to Garlits and he did not know the reason. It was then that Davis said that he was having difficulty hearing her.

have Local 23 present the employees at the store and that it would benefit the employees with respect to better working conditions "and stuff like that."[35]

On April 25 Harshell solicited the signatures on five UFCW authorization cards during a meeting of some of the night crew before their shift began.[36] Harshell testified that he told the employees that they should sign the cards if they wanted Local 23 to represent them at the store, and that all of the involved employees read the cards before signing them. Each of the involved employees gave his signed card back to Harshell at that time and he subsequently gave them to Porter. Harshell did not believe that anyone in management saw the gathering.

On April 29 Respondent's employee Terry Jackson signed a UFCW authorization card. Porter testified that he told Jackson that by signing the card he would be authorizing Local 23 to represent him in collective bargaining; and that Jackson filled the card out and signed it in his presence.

Margaret Black, who had worked as a cashier at Respondent's Hempfield store from September 1984 to July 1986, signed a

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35. While Harshell testified that he gave his UFCW card back to Porter in the parking lot in front of Respondent's Hempfield store, the affidavit he gave to the Board indicates that he gave the card to Porter at his, Harshell's, house. Harshell testified that the affidavit was wrong. Also, assertedly the affidavit is wrong where it indicates that on April 23 he gave Porter cards he, Harshell, solicited since he did not obtain signatures on the cards until April 25. Harshell obtain the cards from Porter in the parking lot in front of Respondent's Hempfield store and he returned the signed cards to Porter at his, Harshell's house.

36. Roy Biedrycki, Scott Bunner, Robert Jupena, Edward Homchak, and Michael Streussnig. General Counsel's Exhibits 63 through 67, respectively.

UFCW authorization card, General Counsel's Exhibit 20, on April 29. She testified that she read the card before signing it; that she was never to to ignore what was written on the card or not to read it; and that she signed the card in her house and give it to Porter.

Respondent's employee John Dick signed a UFCW authorization card on April 29. General Counsel's Exhibit 39. Porter testified that he told Dick that he would be authorizing the Union to represent him for the purposes of collective bargaining; and that Dick signed the card in his presence. In answering Dick's questions, Porter told him that he did not become a member of Local 23 merely by signing the card and that regarding dues he, Porter, could not make a commitment with respect to how much they would be if Respondent ever had a contract with the Union.

On April 29 UFCW filed a charge, General Counsel's Exhibit 1(a), against Davis in Case 6-CA-19076 alleging as follows:

> Since on or about April 19, 1986, the above-named Employer by its officers, agents and representatives, terminated the employment of various employees because of their membership in and activities on behalf of the United Food & Commercial Workers Union, Local 23, AFL-CIO & CLC, a labor organization, because they engaged in concerted activities with other employees of said employer for the purpose of collective bargaining and other mutual aid and protection and in order to discourage membership in said labor organization. At all times since said date, and for the aforesaid reasons, the said

employer has refused, and does now refuse, to employ the above mentioned employees.[37]

Larry Miller, who worked for Respondent at its Hempfield store as a bagger and stockboy from September 1985 to May 14, signed a UFCW authorization card on April 30, General Counsel's Exhibit 22.[38] He testified that he signed the card at a meeting at Kevin Corsaro's house with Porter present; and that he gave the signed card to Porter; and that he read the card before signing it.[39]

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37. A copy of the charge was sent by the Board to the Davis Hempfield store by letter dated April 29, General Counsel's Exhibit 1(b). The receipt attached thereto indicates that it was received at the store on April 30.

38. According to the testimony of Miller, while he spoke with Porter on an unspecified date in the parking lot of Respondent's Hempfield store when he was off duty, Mowery approached and told Porter to leave the employees alone. Miller testified that he began meeting with Porter in Respondent's parking lot a couple of weeks before he signed the UFCW authorization card. In is affidavit to the Board, Miller indicated, as here pertinent, "I do not know if any management officials saw me talking to Porter." Miller gave the affidavit on May 16.

39. Miller testified that Corsaro was a high school friend. Miller was not sure whether Corsaro signed an authorization card on April 30 in his trailer. In his affidavit to the Board, Miller mistakenly indicated that he signed the UFCW authorization card on April 20. Also, Miller apparently could not recall Corsaro's name when he gave the affidavit. And he could not explain why he indicated in the affidavit that he told Kevin that he had signed the card when this assertedly occurred in Kevin's trailer in his presence.

Porter testified that he told Miller that by signing the card he was authorizing the Union to represent him in collective bargaining. Also, Miller and Porter testified that one point Mowery saw him, Porter, talking to Miller in the parking lot of Respondent's Hempfield store and Mowery came out of the store and told Porter to leave the employees alone.

Appendix C

On April 30 Harshell solicited a signature on a UFCW authorization card from David Biedrycki, General Counsel's Exhibit 68. He was not at work on April 25 when Harshell solicited the aforementioned signatures. Harshell testified that he asked David Biedrycki if he wanted Local 23 to represent the employees at the store and Biedrycki signed the card after reading it.

Elda testified that she did ot know about the organizing drive until sometime in May when Respondent received something from the Board; that she was aware that a number of employees were laid off in April; that she never had any conversation with any of the managers concerning the layoffs; that she was surprised about the layoffs; that she did not know about the layoffs before they occurred; and that next to Mowery, she was the number two person in the store.

Kunkle, who was employed at Respondent's Hempfield store from April 1984 to July 25, 1986,[40] attended a meeting on May 1 in the back of the deli department. Other employees attending included Black, Bonnie Tompkins, Laura Emmanuel, Tom Grozik and other employees who she could not remember. Bob Davis and perhaps Mowery were there. Kunkle testified that Bob Davis said that he wanted all "of us" to be one big happy family and to sign the Steelworkers cards; that Davis said that the employees would be happy with the decision to sign the Steelworkers cards; that Davis said that he was going to bring employees from the Greensburg store down to the Hempfield store to train them; that when she asked Davis why, he said it was because the store was different and

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40. She started in the produce department, became a cashier in October 1984 and was moved into the office in January or February 1985. In the office she handled the Lotto machine, the telephone, check cashing, customer complaints, the money in the store, the vault, and the closing of the store. Also, she testified that "she was the head of the cashiers watching the front of the store." Kunkle had also worked for Respondent beginning in 1961 for four years.

he wanted each employee to know each others job so that they could "go from store to store if need be"; that Tompkins asked Davis what the Steelworkers had to offer the employees and Davis got very irate and started hollering to just sign the cards "we are here to make money and not get on the issues"; that the employees then went to Mowery's office where Kathy Donahue and a man who Kunkle believed was an official with the Steelworkers handed out Steelworkers contracts and authorization cards; that after they had been in the room for about five minutes, Bob Davis put his head in the door and said" to make sure that "we signed the cards [and] that we will all be happy"; that she signed the Steelworkers authorization card; and that subsequently she signed a "paper" retracting her Steelworkers authorization card.

Black testified that Bob Davis held a meeting of employees on May 1; that Civiccio told her to attend; that other employees present included Debbie Grieco, Napoleon, and Angelo and Mike from the night crew; that Bob Davis said that he would like everybody to be under one big umbrella and be one big happy family; that Bob Davis said that joining the Steelworkers would be in the employee's best interest and there were a couple of people upstairs that represented the Steelworkers and they were there to talk to the employees; that Bob Davis said that he would be very upset if the employees did not join the Steelworkers; that Davis said that he wanted them to sign the green cards; that Davis did not ask anybody if there was anything he could do for them; that the employees did not ask Davis questions in the meeting held downstairs; that Donahue and Don Miller of Respondent's Greensburg store told the assembled employees that they represented the Steelworkers; that the Steelworkers contract was given to the employees to read; that questions were asked at the meeting held upstairs; that she did not sign the authorization card; and that Kunkle did not attend the same meeting on May 1.

Appendix C

Also, on May 1 Kunkle's immediate supervisor, Civiccio, said, according to Kunkle's testimony, that Mr. Davis would close the store for a month and rehire all new people if Local 23 got in. Kunkle testified that no one other than she and Civiccio were present during this conversation which took place in the office in the front of the store. Kunkle described this conversation as a friendly chat.

Kunkle testified that after the May 1 employees meeting, employees who normally worked in Respondent's Greensburg store began to work in the Hempfield store. In her position she was only aware of two or three Greensburg cashiers, on bagger and Kim Reich, who worked in systems putting prices in the computer. She testified that before this she was not aware of any such transfers of Greensburg employees.

Black testified that after the above-described May 1 employees meeting with Bob Davis, certain of Respondent's employee in the Greensburg store began working in the Hempfield store; and that the transfers involved at least one cashier, two or three people in the deli, two or three people in the bakery, one person in the meat department and one in the produce department.

Ruben Lee Werry started as a bagger at Respondent's Hempfield store in April.[41] He signed a UFCW authorization card on May 1 after reading it, General Counsel's Exhibit 4, and he testified that no one ever told him that the only thing the card would be used for was to obtain an election. On cross-examination, Werry testified that he was not active in the campaign; that he thought fellow employee Larry Miller, who was a former employee of Respondent, solicited his card; that he was not told anything by any

41. He left in May 1987.

Union representative about his job security if he did not sign the card; that a statement he gave to Respondent's counsel on December 18, Respondent's Exhibit 3, indicates that

> [p]rior to receiving the card, Miller told me that I would be out of a job if I did not sign the card because it was Davis' policy to terminate students at the time of graduation. Miller told me that if the union was [in], I could keep my job. Miller also said the only purpose of the card was to get an election;

that one of Respondent's attorneys, John Pekar, who met with Werry, said that this attempt to try to revoke the authorization card "might work"[42]; that Miller did not make the statement about possibly being out of a job when he gave him the card[43]; that about a week before he signed the card he heard rumors about what would happen when he finished school; that he did not recall when he testified herein whether Miller said anything about an election at the time the card was signed; that he believed that when the card was given to him nothing was said by Miller other than if he wanted

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42. Pekar, at the outset of the meeting, asked him if it was true that he had signed a card and he wanted to revoke it. Werry was not sure if Pekar first read a statement which, among other things, indicated that Werry did not have to participate in the meeting and no action would be taken against him. Mowery told him about the meeting after Werry told employee Luwanna Shoemaker that he was interested in revoking his card. Werry testified that the fact that a number of people had been discharged and there were a number of delays in the election were factors he considered in deciding to revoke his card and that he worried about job security if he did not attempt to revoke his UFCW card. Werry signed a petition to revoke his UFCW authorization card on July 24. Respondent's Exhibit 4.

43. Subsequently Werry testified that at some point in time Miller did say "[i]f you don't sign this card, you are going to lose your job."

the Union to go ahead and sign the card; and that he gave a statement to counsel for General Counsel the day before he testified herein, which statement indicates (a) no one told him not to read the card or ignore what was written on it,[44] (b) no one threatened or pressured him to sign, and (c) no one told him that the purpose of the card was to obtain an election.

Respondent's employee Kevin Corsaro signed a Union authorization card on May 1. General Counsel's Exhibit 42. Porter testified that he gave Corsaro the card in Respondent's Hempfield parking lot and that he explained to Corsaro that he would be authorizing the Union to represent him in collective bargaining. Corsaro went into the store for about 5 minutes and when he returned the card was filed out and signed. He gave the card to Porter.

Robert Davis, who has been chairman of the board of Respondent since 1981, testified that he goes to the Hempfield store about once a week when he is in town; that usually he is there for about 20 or 30 minutes; that he conducted a meeting with Hempfield employees on May 1[45]; that on May 1 he saw Sam Picallo, who was a Steelworkers' representative who dealt with Davis in the early 1980's at the Greensburg store; that Picallo told

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44. As here pertinent, the card reads:

"AUTHORIZATION FOR REPRESENTATION

I hereby authorize the United Food & Commercial Workers, Local 23, AFL-CIO, CLC, to represent me for the purpose of collective bargaining."

45. Robert Davis also testified that he held a meeting later in May for the high school students who were going to graduate, encouraging them to further their education.

him that he was having a problem with the transfer of employees from Greensburg, that he was allowed to be in the Hempfield store and that he was not going to make a problem; that Picallo asked if it would be alright to speak to some of the employees at the Hempfield store; that Picallo did not ask to speak to just the Greensburg employees; that Picallo asked him to call some of the employees together; that he called some of the employees together and said: "this is Mr. Picallo from the Steelworkers . . . he has a few questions to talk to you about and it is okay to talk to him"; that the 12 employees he gathered went with Picallo; that he thought they went upstairs but he was not sure; that he then left the store; that he did not see Donahue and Don Miller with Picallo; that he did not recall talking to the 12 employees other than to introduce Picallo; that he said nothing about signing a card or about being one big happy family; and that he did not know that UFCW was trying to organize the Hempfield store until the 1986 Memorial Day weekend, which is treated below.

Picallo testified that he is an organizer for the Steelworkers; that his boss, Jim Poole, had received some calls from some of the employees of Respondent who were concerned about transfers; that Poole told him the involved employees would be permanently working at the other store of Respondent and Poole thought that it was a violation of the labor agreement between the Steelworkers and Respondent since these employees would be working in a non-union store, "they would be considered scabbing or whatever"; that Poole asked him if he would take a ride up to the store and see what was going on; that he went to the Hempfield store, the Greensburg store, and back to the Hempfield store; that Jim Davis agreed that some Steelworkers dues paying members at the Greensburg store were working at the Hempfield store; that he went down to the Hempfield store "to try to secure some cards for organizing that store"; that he saw Robert Davis at the Hempfield store; that before

this he had been to the Hempfield store talking to employees trying to get them to sign up to belong to the Steelworkers; that he had succeeded in getting some authorization cards signed; that he had asked Donahue and Don Miller, both of whom were in the Steelworkers at the Greensburg store, to get Steelworker authorization cards signed; that he talked with Robert Davis,

> I said Bob I said I got some complaints on transfers. I am here and I am talking to these people which I feel I have a right to do. I said I hope nobody gets in a jam because they are talking to me because I didn't know any of the managers of the store or anybody. I want to question the employes on transfers. I said I would appreciate it if you would let these people know that that is what I am here for;

that he did not meet with the employees as a group but rather he met with them individually; that he had asked Donahue and Miller to meet him at the Hempfield store on that day to try to get employees to sign Steelworker authorization cards; that he did not recall whether Donahue and Miller were standing with him when he spoke with Robert Davis but he did not believe that the two were standing there; that he did not go upstairs and he did not know whether Donahue and Miller went upstairs to try and get employees to sign Steelworker authorization cards; and that subsequently he made five or six trips to the Hempfield store within the next month or two.

On May 2 Porter, accompanied by Robin Kaskie, who was employed as an organizer by the UFCW and who was assigned to this organizing drive in the first half of April, obtained a UFCW authorization card from Respondent's employee Paul Williams,

General Counsel's Exhibit 32. Porter testified that Williams had partially filled out the card when they met with him and when Kaskie gave him a pen he filled out the remainder of the card; and that he told Williams he would be authorizing the UFCW to represent him in collective bargaining. On cross-examination, Porter testified that Kaskie told Williams that the reason for signing the card was to authorize the UFCW to represent him in collective bargaining. Kastie testified that she gave Williams a pen to fill out a portion of the card which was not already filled out, namely, the Employer's name and address, and his hire date, department, and hourly rate[46]; and that she explained to Williams that collective bargaining meant getting a contract for wages, benefits and work conditions.

Pam Barnes, an employee of Respondent, signed a UFCW authorization card on May 2, General Counsel's Exhibit 31. Porter testified that when he met with Pam Barnes and her husband, he, Porter, was accompanied by Kaskie; that he told Barnes that she would be authorizing the Union to represent her in collective bargaining; and that she read the card, filled it out and signed it in their presence.[47]

Respondent's employee Mary Kissell signed a UFCW authorization card on May 2, General Counsel's Exhibit 40. Porter testified that he and Kaskie met Kissell at a restaurant in Greensburg; that Kissell was told that she would be authorizing the Union to represent her for purposes of collective bargaining; and

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46. Kaskie testified that the card was already signed and all of the "important stuff" was already completed; and that she did not have any contact with William's parents when he signed the card.

47. Kaskie corroborated Porter.

that Kissell filled the card out and signed it in his presence.[48]

On May 2 UFCW filed a petition for election covering Davis' Hempfield employees, Joint Exhibit 12.

Kunkle signed a UFCW authorization card on May 3, General Counsel's Exhibit 16. She testified that she read the card before signing it; that she was never told not to read the card before signing it; and that she gave the card to Porter after signing it

Defibaugh obtained a signature on a UFCW authorization card from Cheryl Goodlin on May 3, 1986, General Counsel's Exhibit 25. Defibaugh testified that she gave the card to Goodlin who read it and signed it in her presence and then returned it to her; and that regarding the card, she told Goodlin that the Union would represent her if she wanted to sign it. Defibaugh gave the signed card to Kaskie.

On May 3, according to her testimony, Shotts told Mowery that her husband was laid off the day before and she wanted to come back to work. Assertedly, Mowery said that Bob and Jim Davis were out of town at a convention and he would have to speak to them and get back to her on May 8.

Toffolo testified that a few weeks after she left, Shotts asked him if she could come back to work and he told her that there was nothing available at that time.

Corinne Greaves, who is a cashier at Respondent's Hempfield store, signed an authorization card on May 4. General Counsel's

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48. Kaskie testified that she put a star in the upper left corner of the card to note tht Kissell was "real gung ho" and Kaskie thought Kissell might be a "key."

Exhibit 44. Kaskie testified that she explained to Greaves what collective bargaining meant at one of the employee meetings at the Mountain View Hotel, and that Greaves filled the card out in Kaskie's presence.

Miscovich, who was a bagger at Respondent's Hempfield store, signed a UFCW authorization card on May 5 at a 7-Eleven store up the road from Respondent's Hempfield store. General Counsel's Exhibit 3.[49] Prior to this he had no involvement with the UFCW and after this he did not engage in a union activity, except picketing.

John Kula, a meat clerk at Respondent's Hempfield store began working for Respondent in 1984. On May 5 he signed a UFCW authorization card which he read prior to signing, General Counsel's Exhibit 12. Kula testified that he was not told that the only purpose of the card was for obtaining an election. When Shotts gave him the card, she merely said to read it before he signed it.[50]

Respondent's employee Scott Graham signed a Union authorization card on May 5. General Counsel's Exhibit 41. Porter testified that he told Scott the he would be authorizing the Union to represent him in collective bargaining; and that Scott filled out the card and signed it in his presence.

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49. Respondent stipulated to the authenticity and validity of the following six UFCW authorization cards: a card signed by Ingeborg Kunz on May 16, one signed by Craig Steiner on May 1, Sam Grace on May 7, Joe Phillips on May 6, Marjory Sullenberger on May 10, and Staci O'Brien on May 10. General Counsel's Exhibits 5 through 10, respectively.

50. About one month after he signed the UFCW card, Kula signed a Steelworkers' authorization card. He did not recall ever signing a form for UFCW revoking his Steelworkers card.

Appendix C

Vallozzi, an employee of Respondent, signed a Union authorization card on May 5. General Counsel's Exhibit 43. Porter testified that he told her that she would be authorizing the Union to represent her in collective bargaining; and that she filled out the card and signed it in his presence.

Counsel for General Counsel sponsored General Counsel's Exhibit 56 which purports to be a UFCW authorization card signed by Tammy Traister on May 5. For purposes of comparison, an employment application signed by this individual was also introduced, General Counsel's Exhibit 57.

Wendy Sarsfield was employed as a cashier at Respondent's Hempfield store from September 1985 to May 1988.[51] She signed a UFCW authorization card on May 6, General Counsel's Exhibit 11. With respect to signing the card, she testified that she read the card prior to signing it; that she was not told that the card was only for the purpose of obtaining an election[52]; that she was not told to disregard the language on the card; and that she was not threatened in any way.

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51. She testified that she left Respondent's employ because a new manager had her doing a lot of different things in the store and very rarely did she work on her cash register; and that while she was angry then and when she testified herein, she was not angry enough to perjure herself herein.

52. Sarsfield testified that when she was given the card to sign she did not believe that the solicitor said anything but later she heard from employees in the store that the purpose of the card was to get an election. She met with Pekar on January 26, 1987. Regarding this meeting, Sarsfield testified that she did not believe that she had a choice but rather she had to meet with Pekar; that she was afraid when she went upstairs to meet with Pekar; that she did sign a statement, Respondent's Exhibit 6, which indicated that she could refuse to participate and no action would be taken against her; and that Pekar drafted a statement but she refused to sign it.

Appendix C

Defibaugh obtained a signature on a UFCW authorization card from Angela Sherrow on May 6, General Counsel's Exhibit 26. Defibaugh testified that Sherrow read the card and signed it in her presence; and that she told Sherrow that the card was to have the Union represent her. Defibaugh gave the signed card to Kaskie.

On May 6, Porter and Kaskie held a meeting of certain of Respondent's employees at Black's house.[53] Certain of the employees who attended the meeting signed UFCW authorization cards while they were at the meeting.[54] Porter testified that the employees present were told that by signing the Union authorization cards they were authorizing Local 23 to represent them in collective bargaining. Moore and Marchetti arrived at the meeting after it had started. Moore gave the Union representatives her Union authorization card which had already signed and which was dated May 5. General Counsel's Exhibit 35. Marchetti also gave Porter his Union authorization card which was already signed and dated May 5. General Counsel's Exhibit 38. Porter believed that he explained to Moore and Marchetti that by signing the cards they were authorizing the union to represent them in collective bargaining.[55]

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53. According to Porter, the meeting was attended by Black, Emmanuel, Lisa Crivella, Tompkins, Theresa Colosimo, Defibaugh, and either Kunkle or Welsh. Kaskie testified that she, Porter, Kunkle, Black, Brian Marchetti, Tompkins, Emanuele, Colosimo, Missy Moore, and Crivella were there.

54. Emmanuel, Crivella, Tompkins and Colosimo. General Counsel's Exhibits 33, 34, 36 and 37, respectively. Kaskie corroborated Porter's testimony regarding these cards.

55. Subsequently he testified that he asked both of them if they understood the reason for signing the card and they said that Jeff Ritison had told them. Both Marchetti's and Moore's card had "5-5-86 from Jeff at Don's house" written on the front. Porter explained that Kaskie gave the two cards, at his trailer, to Ritison, who

(Cont'd)

Appendix C

Counsel for General Counsel sponsored General Counsel's Exhibit 49 which purports to be a UFCW authorization card signed by Jennifer Thomas on May 6, and General Counsel's Exhibit 53 which purports to be a UFCW authorization card signed by John Rusnica on May 6.[56] For purposes of comparison, W-4 forms and employment applications signed by these individuals were also introduced, General Counsel's Exhibits 50 through 52 and 54 and 55, respectively.

According to her testimony, when she did not receive a telephone call from Mowery on May 8, Shotts telephoned him, asking him if he had heard anything about her returning to work. Shotts testified that Mowery said that he had spoken to Jim Davis and he said that it would not be a good time for her to come back to work then and Respondent did not really need her; that Mowery said that it was because of the union situation with the Steelworkers; that she told Mowery that Davis has employees

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(Cont'd)
a former employee of Respondent, to give to Marchetti and Moore. Kaskie testified that she explained to Moore that the purpose of the card was for collective bargaining to get the employees a contract or wages and benefits and working conditions; and that Ritison passed out cards and he must have given them to Marchetti and Moore who brought cards to Black's house, which cards were already filled out. Kaskie did not give them the cards at Blacks. She had no idea why she wrote "5-5-86 from Jeff at Don's house" on the reverse side of Moore's card.

Kaskie also testified that the employees present asked about revoking the Steelworkers cards, indicating that they felt like they were forced to sign them; and that at the meetings the employees were told that there would be an initiation fee. Marchetti, Tompkins, Crivella and Kunkle signed letters dated May 6 revoking their Steelworkers authorization cards, Charging Party Exhibits 1 through 5, respectively.

56. The reverse side of the card has the following notation: "5-06-86 from Brian M. at Peggy's RK." Apparently this notation refers to the above-described meeting at Black's house.

coming down from the Greensburg store taking her job[57] and they were hiring people, and she had been told that she could come back; and that Mowery said that he could not say anything until the union business was settled.[58]

Mowery testified that he was not aware that Shotts ever wanted to come back to work at the store.

Kunkle obtained the signatures on three UFCW authorization cards. All are dated May 10.[59] Kunkle told each of the employees that the card was to get Local 23 to represent them. When the employees gave them back to her she gave them to Porter.[60] She also attended UFCW meetings which were held at a specified restaurant and at Black's home.

Pomaibo, who is employed by Respondent at its Hempfield facility, signed a UFCW authorization card on May 12, General

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57. While she was in the Hempfield store shopping, Shotts saw employees she did not recognize. Pamaibo told her that one was Lisa who was from the Greensburg store and another was Bonnie, who Shotts did not believe was from the Greensburg store but rather recently hired. Prior to Shotts' layoff, an employee from the Greensburg store came to the Hempfield store to help set up a fish case in the meat department. According to Shotts' testimony, the Greensburg employee stayed at the store for a couple of hours at a time and her visits ended before the involved organizing drive.

58. At the time she testified herein, Shotts had not been recalled by Respondent.

59. The following employees signed and returned the authorization cards to Kunkle: Becky Mascolo, Jean Ann Bennett and Chris Goodman. General Counsel's Exhibits 17, 18 and 19, respectively.

60. Kunkle testfied that when she solicited these cards none of Respondent's managers were around.

Counsel's Exhibit 45. Kaskie testified that Pomaibo attended one of the Union's meetings at the Mountain View Inn and signed the card afterwards; that during the meeting collective bargaining was explained and it indicated that the card could be used for a recognition demand or election; and that she witnessed Pomaibo signed the card.

On or about May 12, according to the testimony of Miscovich, Bob and Jim Davis called a meeting at the store. Assertedly eight employees went upstairs to the store manager's office where they were told by Bob Davis that he knew that all of the employees there had signed UFCW authorization cards and he wanted to know what the problem was and why had they signed the cards. Also, assertedly Bob Davis said that if there was any kind of a problem, if there was anything he could help the employes with, they should just ask. Miscovich remembered that Buhl and a Linda from the office were there but he could not recall who the other five employees were. According to Miscovich, Bob Davis also spoke about how he helped people get a job.[61]

On May 12 or May 13, Kunkle had a conversation with Mowery in the office in the front of the store, during which Mowery assertedly said that Mr. Davis would close the store and rehire all new people if Local 23 got in. Kunkle could not recall whether she or Mowery brought up the topic of the Union. She testified that she and Mowery were friendly; and that neither he nor any other of Respondent's managers ever asked her about her role in the Union campaign. Kunkle believed that she might have mentioned Mowery's and Civiccio's statements about the store

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61. Miscovich testified that Bob Davis held meetings with the employees before May but he, Miscovich, could not remember when the meetings took place or who was present. He did remember that the meetings dealt with work procedures.

closing to the other women who worked in the front office at the time; Bennett and Mascolo. But she was sure that she did not mention these statements to other employees before she solicited authorization cards for the Union.

Mowery testified that Kunkle brought up the Union asking him what he thought about it; and that he told Kunkle that the Union did not bother him in that Respondent had a union at its Mount Pleasant store where Mowery formerly worked, and he also belonged to a union when he worked for Volkswagon.

Kaskie testified that on May 13 she, Ron Kean, who was Kaskie's boss, and Tom McNutt, who is a UFCW business agent, went to Respondent's Hempfield store and met with Bob Davis in the store's snack bar or cafeteria. Kean told Davis that they were demanding recognition because they represented a majority of the employees and Bob Davis said "No," he couldn't do that.

When Larry Miller punched in on May 14 he allegedly was told by Elda to attend an employee meeting being held upstairs in the store. Miller testified that he did not know the last names of other employees present, namely, Ed, Scott, Tami, Glena, Lina and Cheryl. According to Miller's testimony, Bob Davis spoke about the people from the Union talking to the employees. Davis assertedly indicated that those people were trying to push things down the employees throats; that those people were pushing the employees around saying that they could help us; that nobody could help the employees except Davis and his family; and that he had heard terrible rumors about people speaking to the employees in the parking lot. Miller testified that Davis also spoke about how he helped certain employees like Cheryl with her schedule because she attended college; and that Davis did not ask the employees during this meeting to sign a card for the Steelworkers.

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Later during his shift on May 14, Miller was told by Elda to go upstairs to the office to meet with Mowery. Elda accompanied Miller to the office and remained there during the meeting. Miller was told by Mowery that he had observed him clowning around and eating and drinking in the receiving area. Mowery had a box with a number of items which were opened. Miller testified that he told Mowery that he did not steal the items:

> that a lot of times . . . we have a soda machine in the receiving area and we would buy things on break. They might be laying around back there and we would eat them or whatever, share them with follow employees.[62]

Mowery told Miller that he was fired. According to Miller, the two other employees with him at the time, B. J. Compana and Corsaro, were not discharged.

Elda, Toffolo, Sandy Reich, Mowery and Jim Davis testified that they did not know that Miller signed a UFCW authorization card or supported UFCW or engaged in union activities on behalf

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62. On cross examination, Miller, when asked about his testimony on direct that he purchased the material that he was eating, initially testified "Yes, mostly [sic] likely we did." Later, he testified "We did purchase it." Also, Miller testified that he told Mowery that he, Miler, bought the item in question. Two days after the firing, when he gave his affidavit to the Board, Miller did not have the Board agent include in the affidavit a statement that he, Miller, did buy the corn curls. And he testified herein that he did not tell the Board agent that he told Mowery that he bought the items in question. Finally, on redirect he testified that he told Mowery "[t]hat I could very well bought them or somebody else would have bought them. And we shared our items in the back room, in receiving. And I did not steal." Miller did not give to Mowery and Mowery did not ask for a receipt for the items which were consumed two or three days before this meeting.

of the UFCW prior to mid-May 1986. Mowery asked Elda to sit in when he spoke to Miller. She testified that when Mowery asked Miller if he consumed any of the items without paying for them, Miller admitted to it; that she was not present when Mowery spoke with Campana before he spoke to Miller; and that Campana was not fired. Mowery testified that the store was experiencing a pilferage problem in the stockroom of the warehouse; that the store had experienced pilferage problems in the past; that a lot of empty soda cans and opened packages of chips, cookies and peanuts were found in the stock room; that two employees worked in the room as pullers, namely, Miller and Campana; that he talked to Campana who denied eating or drinking any of the involved items; that no one else was present when he spoke to Campana; that Elda was present, at his request, when he spoke to Miller; that he asked Miller if he had eaten the contents of the packages he had in front of him or drank any of the soda; that Miller said yes he did; that he told Miller that he had no choice and he had to fire him; that he did not first ask Miller if he had paid for what he consumed or if he just took them; and that store policy requires that the employee keep a receipt for goods while he or she is consuming them but there is no requirement that the employee keep the receipt for some indefinite period of time; that it is the policy that anytime there is going to be a reprimand of an employee, another person should be present; that that day Campana was at the store before Elda; that she came in at 4 pm; that he spoke to Miller 30 to 45 minutes after he spoke with Campana; that "it had to be one of them . . . [and] Miller admitted to it"; that Miller did not indicate that either he or someone else paid for the goods consumed; that at that time there was a night crew on duty at the Hempfield store overnight; that they had access to the involved storeroom; that Miller was not the first person discharged for pilfering at the Hempfield store; that before Miller was discharged three other employees were discharged for pilferage; and that after Miller was discharged, two night crews

were discharged for the same reason[63].

On May 15 while Kunkle was in the office in the front of the store she heard Bob Davis tell a cashier that he was very upset that his employees would go behind his back to go to Local 23.

Black testified that around May 15 Bob Davis approached her register. Assertedly it was a very slow day and there was no one else around her register. Black testified that Bob Davis told her that he was very unhappy and upset that some of his people were going behind his back to join with Local 23; that she told Davis that Respondent's Hempfield employees were unhappy with the fact that Greensburg employees were being transferred to the Hempfield store; that Davis said that he wanted his Greensburg people to train us as to the operation of his Greensburg store; that Davis said that his door was always open anytime we wanted to talk and we were welcome to come in; that Davis said he took care of his own; that Davis said that he would not have Local 23 in his store; and that at the time Kundle was in the front office about 10 feet from her, Black's register.

On May 23, Helen Aalborn, who is employed by Respondent at its Hempfield facility, signed a UFCW authorization card, General Counsel's Exhibit 46. Kaskie testified that Aalborn read, filled out and signed the card in her presence; and that she told Aalborn what collective bargaining meant.

The Union began picketing at Respondent's Hempfield store

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63. The night crew included Harshell, Scott Bunner, Rob Japena, Roy and Dave Biedrycki, Graham and John Hart.

on May 23. Kaskie arrived at the store at about 8 am. She testified that the pickets had unfair labor practice signs[64] and they handed out handbills which spoke to the alleged unfair labor practices of Respondent; that she and other pickets stationed themselves on the sidewalk in front of the store[65]; that the two entrances to the parking lot of this store are wide enough to accommodate one car entering and one car exiting at the same time; that when the pickets took up their position on the sidewalk in front of the store, Bob Davis came out of the store and told them that they were not allowed to be there and he was going to call the police; that she informed Bob Davis that she had already telephoned the State Police to tell them what

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64. The picket signs read:

Davis Market
Unfair
We want the public to know that
this company has committed unfair
labor practices designed to deny
employees their rights under
the NLRB.
Please do not patronize.
United Food and Commercial Workers
Union, Local 23 AFL-CIO

There is some indication that an "A" is in the sign but this is not clear. The sign measured about 24 inches by 18 inches. And the word "Unfair" was about 2 inches high and the remainder of the letters in the sign were about 1 inch high, except "Please don't patronize" which was about 1.5 inches high.

65. Kaskie estimated that at most there were twelve picketers in front of the store; and that some of them moved away from the doors. She recalled some of the picketers, namely Defibaugh, Shotts and Good.

the picketers were going to be doing; that the State Police did arrive later that day; that that same day there was an older man selling raffle tickets for a car which was parked in the lot in front of the store; and that Napoleon, Steve Davis, and Buhl took photographs of the picketers.

On May 24 the picketers were advised that as a result of a legal action they could not picket on the sidewalk in the front of the store. Kaskie testified that on May 24 her boss, Kean, showed her the injunction and told her that the picketers had to get off the sidewalk; that neither the Davises nor the police told the picketers to get off the sidewalk on May 24; that three picketers were allowed at both of the two entrances to the involved parking lot and two picketers were allowed to handbill in the parking lot up to the third row of cars in the lot nearest the store; that the people handbilling in the lot were not allowed to wear signs and the people who wore signs at the entrances to the parking lot were not allowed to handbill; and that the picketers by the entrances to the parking lot stood in grassy areas.

Welsh picketed at Respondent's Hempfield store during the Memorial Day weekend in 1986. She was stationed by an entrance to Respondent's parking lot passing out information on what Respondent was doing and she saw the Davis' come and go. She picketed for some time after that whenever she could.

Kunkle engaged in informational picketing at Respondent's Hempfield store on May 23, 24 and 25 with Black and some UFCW officials. While she was picketing, mostly at the driveway entrance to the parking lot, she saw Bob and Jim Davis and Mowery. Kunkle testified that Mowery directed Napoleon to take pictures of her and

Black while they picketed.[66]

Defibaugh also engaged in picketing at Respondent's Hempfield store over the 1986 Memorial Day weekend, May 23-25. She arrived at the site at 8 am on May 23. Regarding the picketing, she testified that there were eight people on the sidewalk near the front doors[67]; that they carried signs which read "Unfair Labor Practices. Do Not Patronize This Store, Davis Supermarket. Local 23, UFCW"; that the picketers distributed handbills which covered unfair labor practices and people being laid off; that the Hempfield store is located on Highway 136 and Janice drive; that there is a parking lot in front of the store with a driveway on both of the aforementioned streets; that the involved store is the only business located on this property; that at various times during the picketing various managers, including Bob Davis, Mowery, and Elda entered and left the store; that Napoleon took pictures of the picketers; that in May 23 some organization had a table set up on the sidewalk by the front door and they were selling raffle tickets

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66. Black corroborated Kunkle, adding that Buhl also took their photographs. A couple of weeks after she picketed, black's hours were reduced and she was given a steady 7 am to 1 pm shift. Before that she worked during the evening with her hours fluctuating. Her total hours per week varied between 36 and 39. After picketing they were reduced to 26 to 30 hours. They remained at the lower level for about a month. Black testified that Jim Davis never talked to her after she walked the picket line.

67. Assertedly, four stood by the side of the entrance door and four stood by the side of the exit door. Defibaugh testified that the pickets were not in front of the doors but rather were usually off to the side; and that while she was there she never saw anyone unable to get into or out of the store because of a picket. She conceded that occassionally it did get congested in the area when people stopped to talk to the picketers.

for a car which was parked nearby[68]; that usually around holidays there were church groups or school organizations in front of the store selling tickets and other things; and that a public relations representative from the Pennsylvania State Police appeared at the store and he spoke to Respondent's management on May 23.

Davis filed a complaint in Equity in the Court of Common Pleas of Westmoreland County, Pennsylvania on May 23 wherein it sought to have the UFCW temporarily and perpetually enjoined from entering onto Davis' premises located at Route 136 and Janyce Drive, Hempfield Township. Joint Exhibit 1.[69] On May 24 the court entered an order which indicates that the order was entered by agreement of the parties; that the UFCW agrees that

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68. One or two people were involved in selling the raffle tickets. Harshell testified that on Memorial Day he saw the pickets and also two people selling raffle tickets for a car at a card table set up on the sidewalk in front of the store. He also testified that occasionally there were people in front of the store selling tickets for different things.

69. The complaint, as here pertinent alleges as follows:

> "6. Commencing at about 8:00 a.m. on May 23, 1986, approximately six (6) individuals holding signs bearing the name of the Union Defendant entered onto the property of Plaintiff and remained positioned at the main entrance of Plaintiff's Hempfield Township store.
>
> 7. Defendants were requested and directed by Plaintiff to leave the premises but refused to do so.
>
> 8. Defendants continue to persist in their unlawful conduct of trespass.
>
> 9. The trespass by Defendants places in jeopardy Plaintiff's good will and business relationships."

during the term of the order picketing of Davis' store would be limited to (1) two pickets stationed at each entrance to the premises who would remain off Davis' property and carry informational signs but not pass out leaflets or stop cars and (2) two female pickets who shall be allowed on Davis' premises to handbill but shall approach no closer to the store building than the third row of painted parking stalls closest to the building. Joint Exhibit 2. The Order remained in effect until May 28.

Elda testified that on the first day of picketing there were at least 8 to 12 pickets on the sidewalk by the front door; that there were many in the parking lot; that the ones in the parking lot handbilled customers; that customers complained to her; that she saw Jim and Bob Davis on the sidewalk talking to the customers or the pickets and that Mowery was out on the sidewalk also.

Toffolo testified that during the picketing over Memorial Day weekend he was called to the front of the store to assist in getting some shopping carts off the sidewalk and bring them into the store. He testified that the picketers "were sort of in the way of the doorway. You would have to swing wide, with three or four shopping carts, like a matter of constantly having to move people to get around them"; that there were between 12 and 15 picketers on the sidewalk in front of the store, 3 or 4 out in the parking lot and several at each entrance to the parking lot; that one of the picketers spoke to Bob Davis and "[h]e said, I'm going to get you, Bob Davis"[70]; and that he heard the picketers tell customers to not shop there because "[t]his guy's a criminal" and they should shop somewhere else like the Giant Eagle.

Reich testified that one of the picketers who was standing by

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70. Subsequently Toffolo testified that the person saying this was a "she."

the front of the store said "Get out of here bitch" to her, which scared her half to death[71]; and that she saw Welsh on the picket line over the Memorial Day weekend.

Robert Davis testified that the picketers blocked the front of the store and customers had to squeeze around them; that the picketers were telling people not to shop here but to go to Giant Eagle; that he went out and spoke to the customers assuring them that the picketers would not harm them; and that he saw a lot of the leaflets on the ground and he picked them up.

Mowery testified that the picketing by UFCW was the first he heard of a union organizing campaign being carried on by Local 23; and that he did not know that UFCW had filed a petition with the Board concerning the involved employees. Jim Davis also testified that prior to the picketing over the Memorial Day weekend he was not aware of any union activity by Respondent's employees in support of Local 23 or of an organizing campaign. In early May both Mowery and Jim Davis saw UFCW's petition for an election, which was forwarded to Respondent by the Board.

On May 24, Nancy Matson, who is employed by Respondent at its Hempfield store, signed a Union authorization card. Kaskie testified that she explained to Matson what the card was for and told her that if she was interested in Union representation she should sign the card; and that Matson signed the card in her presence. Kaskie also testified that with respect to the cards she witnessed, she never told any of the signers not to read the card, she never told the signers to ignore that was written on the card, she

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71. She described the individual as being a very large man, 6' 5" and weighing about 250 pounds. She could not remember the color of his hair or what he was wearing.

never told the signers that the sole purpose of the cared was to obtain an election, she never threatened employees in order to obtain a signature on a card, and she never promised employees anything to obtain a signature on an authorization card.

Elda testified that there was a management meeting on May 24, the second day of the picketing, at which it was indicated that the picketers were only allowed at the entrances to the parking lot with two of the picketers in the parking lot. Toffolo testified that on the second day of picketing in May there was a meeting of the managers at the Hempfield store; that there was no discussion of which employees did or did not support the Union; that they were told not to speak to the pickets; and that he did not recall Elda being at the meeting. Mowery testified that the managers were told at this meeting that they should make sure that the rules were being followed and any violations of the rules should be noted and reported to Jim Davis. Mowery saw Kunkle picketing over the Memorial Day weekend.

When Kunkle went to work on May 25 after picketing, she was sent to the produce department to wrap strawberries by Elda, who, as noted above, is the assistant store manager. As she left the store to go home, she asked Elda why she was sent to produce and Elda told her that she was replacing somebody. When Kunkle asked who the person was Elda assertedly did not reply.

Elda testified that she did refer Kunkle to the produce department to wrap strawberries because Kunkle had experience in the produce department, someone had called off in the produce department, and while she, Elda, does not normally get involved in produce department matters, there were no other managers in the store at that time on Sunday.

Appendix C

On May 28 the above-described Pennsylvania court entered an Order enjoining UFCW[72] from picketing Davis' place of business except for three pickets who may be stationed at each entrance to the parking lot of the premises, off the property of Davis, which pickets may carry informational signs and pass out leaflets but shall not physically impede or stop the movement of the traffic to and from the parking lot. Joint Exhibit 4.

Also, on May 28, Davis' attorney, in a letter, Joint Exhibit 3, to Robert Davis, stated:

> As you recall, we tentatively agreed, on a trial basis, that notwithstanding the Order of the court, we would permit two pickets in the parking lot and two pickets at each entrance. The two pickets at each entrance will do nothing but carry signs, and the two pickets in the parking lot, three rows from the driveway, may merely pass leaflets as long as they behalf themselves!
>
> I believe this is an excellent result, and in the event the parking lot people need to be removed, we have an order to do so.

On June 2 UFCW filed a charge in Case 6-CA-19159, General Counsel's Exhibit 1(j), alleging as follows:

> Since on or about May 23, 1986, the above-

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72. The Order states that Defendants are hereby enjoined. The Defendants in the case were UFCW, Local 23, and its officers, representatives agents and employees, individually and or acting in concert with UFCW, Local 23.

named Employer [Respondent], by its officers, agents and representatives, restrained and coerced its employees in their exercise of the rights guaranteed by Section 7 of the Act, by demanding that employees cease picketing and other concerted activities in the store parking lot.

On June 3 a Board hearing was held on UFCW's petition for an election in 6-RC-9693, Joint Exhibit 12.

Shortly after he signed the UFCW authorization card, Miscovich's work schedule changed in that while his normal schedule called for him to work in the store during the daytime so that he could work at a gas station at night, his schedule was changed so that he was slated to work a couple of evenings. His immediate supervisor, Civiccio, who is the front end manager, had originally told him that there would be no problem with scheduling him to work during the day. And Mowery, the Hempfield store manager, asked him if he had a night job and Miscovich told Mowery that he, Miscovich, pumped gas at night. When his schedule was changed, Miscovich asked Civiccio why she was scheduling him for evenings and assertedly she replied that she scheduled him for days and Mowery changed the schedule and was scheduling him for a couple of evenings. When Miscovich asked Mowery about the schedule changes Mowery assertedly acted as if he did not know that Miscovich worked a second job at night. Allegedly, Mowery told Miscovich that if he could not follow the schedule than "you can't work." At first Miscovich telephoned Respondent indicating that he would not be able to work that evening. Assertedly he kept telling Mowery that he knew that he, Miscovich, had to work evenings and after a few weeks Miscovich just did not go in to work after a fellow employee told him that he was not on the schedule.

Appendix C

Elda, Toffolo, Sandy Reich, Robert Davis, Mowery and Jim Davis testified that they did not know that Miscovich signed a UFCW authorization card, or supported the UFCW or engaged in union activities on behalf of UFCW prior to June 1986. Mowery testified that in May 1986 there were complaints from customers that there were not enough packers on duty at night; that there were a lot of high school graduations and high school students were studying for finals; that he told Civiccio to schedule more night time packers; that Civiccio told him that Chuck had another job at a gas station; that he told her to schedule him when she needed him; that she did schedule him to pack bags at night; that after the schedule was posted, Miscovich told him that he could not work at night because he had this other job; and that he told Miscovich that whenever he is scheduled to work that is when he is expected to work.

On June 27 the Board issued a Decision and Direction of Election, Joint Exhibit 13. It was concluded therein that the following unit was appropriate for purposes of collective bargaining:

> All full-time and regular part-time employees employed by the Employer at its Hempfield Township, Pennsylvania, location; excluding confidential employees, students employed pursuant to cooperative education programs and guards, professional employees and supervisors as defined in the Act.

According to Welsh, sometime during the week before July 4, Sandy Reich telephoned Welsh at home and offered Welsh her job back. Welsh asked if she would be able to keep her job or if she would be laid off in a while. When Reich said that she could not

guarantee anything, Welsh indicated that she had to turn the job down.[73]

Reich testified that in mid-June Jim Davis told her that he trusted her judgment and that she could bring Welsh back; that when she asked Welsh to come back Welsh told her that she could not because she did not feel comfortable with Respondent's management; and that she told Welsh that she, Reich, was sorry to hear that but she understood and she wished Welsh well.

When Kunkle returned from vacation on July 5 she was assigned to work in the meat department. She asked Mowery what was going on. Assertedly, Mowery told her that Jim Davis wanted her back in the meat department since there were people going on vacation and she knew how to wrap.[74] Kunkle told Mowery that she thought the transfer was unfair. She testified that she probably asked Mowery if the transfer was permanent or temporary but she did not remember what Mowery said in this regard. Kunkle testified that when she asked Mowery if she would be going back to the front office, Mowery did not reply. Kunkle had never worked in the meat department before but she indicated that the wrapping procedure and machine are the same. She was told to just stand

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73. Respondent's Exhibit 8 is a note Welsh wrote to Reich indicating that she could not come back to work "[m]ostly because I can't trust your *employer.*" (emphasis in original) Welsh testified that she was concerned that Respondent just needed people for a holiday or two and that she was going to have to leave her other job.

74. Kunkle testified that Mowery did not telephone her prior to going to the meat department to ask her if she minded the assignment. Rather, she noted the change when she saw the schedule. Kunkle testified that Pomiabo did not take her vacation until July 25.

there are wrap meat.[75] Her job in the front office was assertedly taken by Grieco, who was a cashier and who had no experience opening and closing.[76]

On one occasion while Kunkle worked in the meat department she spoke with the wrapper who stood across from her, Bonnie Duncan. Jim Davis approached and told Duncan that she was not allowed to talk to Kunkle other than regarding meat. Assertedly, Duncan looked at Davis and laughed. Kunkle testified that Respondent, before that, did not have a rule about talking between employees.

On another occasion, three or four days after she started in the meat department, Kunkle was putting out hot dogs in the meat counter and Jim Davis told her that she was not allowed to be out in front; she had to stay in the back and wrap. Consequently, since Kunkle wrapped faster than the butchers could cut, she would just sit there when she was finished her wrapping.[77] On one occasion

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75. Kunkle testified that normally meat wrappers wrap meat, price it, take it out and fill up the counters and wait on customers at the counter. This was corroborated by Garris, who also testified that it would take three weeks to train a person to price and to stock in the meat department. On the other hand, Garris testified that a person could learn how to put meat in the case and straighten up the case in a day. Garris also testified that wrapping was the hardest part of the job for her to learn because it took her a couple of months to develop "the flick of the wrist."

76. Opening is described as opening the vault, giving each cashier their drawer, opening the machines and opening the computer. Closing is described as closing the computer, all of the registers, counting the money in the vault and making deposits. Previously, Grieco ran the lottery machine in the office one time for about 30 minutes.

77. About six times a day Kunkle would do nothing for periods of up to 10 and sometimes 15 minutes waiting for meat to wrap. Garris testified that while she (Cont'd)

she indicated to the other wrapper that she had to find something to do during the slack periods and the other wrapper, Pomiabo, gave her some meat to put out. Kunkle saw Jim Davis get Mowery. Both men came back to the meat department and spoke to Pomiabo who, in turn, told Kunkle that she was not allowed to put meat out front and that she should go back to wrapping. Kunkle asserted that working in the back as a wrapper limited her contact with other employees and customers.

While Kunkle normally worked 36 or 38 hours in the front office, she was only allowed to work from 8 am to 1 pm and her total hours a week were reduced to about 20. She could not recall whether she complained to Mowery about the reduction in her hours. Kunkle described the working conditions in the meat department as smelly, dirty and bloody.[78]

Elda testified that she took no part in the decision to transfer Kunkle to the meat department; and that Kunkle performed satisfactorily in the office.

Regarding Kunkle's transfer to the meat department, Toffolo testified that it was in the summer and he was having a problem with coverage due to vacations that were coming up and he needed

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(Cont'd)
experienced periods of inactivity, she generally spent the time straightening up the cases. Garris also testified that she had never seen a wrapper just stand around for a period of time waiting for meat to wrap. All of the people she worked with, however, were permanent; none were temporary.

78. Garris, who worked in the meat department for about 10 weeks, testified that there was blood in the meat department but that the meat department was "not really" dirty. Garris enjoyed working in the meat department and preferred it to any other area in the store.

some temporary help; that he asked Mowery for help; that Mowery told him to put Kunkle on the schedule since she had experience wrapping; that it turned out that Kunkle was probably better than anyone in the meat department at wrapping; that it takes 3 to 6 months minimum to train an employee to perform all the functions in the meat department; that Kunkle never complained to him about (a) conditions in the meat department, (b) not having enough to do, and (c) the number of hours being scheduled; and that Kunkle did not request a transfer.

Mowery testified that Toffolo came up to him and said that he needed someone to cover vacations in the meat department; that Toffolo did not give him a specific duration but he was sure it was only couple of weeks; that he was using a lot of employee hours to run the store and he did not want to hire someone; that he contacted Kunkle and asked her if she would go back to the meat department as a wrapper to cover vacations; that she agreed to do it; that Kunkle never complained to him about anything while she was in the meat department; that Kunkle's job was not given to Grieco since although Grieco started working in the office about the same time as Kunkle went back to the meat department, Grieco was replacing Mascola who gave her notice on June 19 that she was going to leave on June 27; that the managers in the office took over Kunkle's office duties; and that Kunkle was not replaced in the office by Karen McFarland until after she, Kunkle, quit in late July or early August.

Harshell was terminated on July 14. He was told he was being terminated for taking and eating food and not paying for it. He testified that Respondent has a rule that employees must pay for any food before they consume it. Harshell did not attend any Union organizing meetings before his termination.

Appendix C

Between July 14 and 19 Kunkle attended a meeting of employees in the upstairs lunchroom in the Hempfield store. Jim Davis, Mowery and Elda were present. Bob Davis may have been present, according to Kunkle. Kunkle estimated that there were about 50 people in the room. During the meeting, Jim Davis said that he did not want his employees to be intimidated by bullies or ring leaders of Local 23. According to Kunkle, Jim Davis was looking at her and Black when he made this statement.[79]

Jim Davis testified that a week or two before the election was to be held, which was the end of July, he held three meetings with Respondent's Hempfield employees on the same day; that at each meeting he told the employees that the election was upcoming; that he asked the employees to come and vote indicating that it was important to Respondent that they voted and they could choose whatever it was that they wanted; and that there were 30 to 40 employees at each of the three meetings.

On July 22 the Union's picket line went back up. Kaskie testified that at first the picketers were allowed in the parking lot up until some time in August when they were told they could no longer be in the lot; that sometime in July Steve Davis told her that he was

79. Black corroborated Kunkle, adding that there were 30 to 40 people in the room. Sandy Reich testified that she attended a meeting of employees in mid-July regarding the upcoming Union election; that she never directed any employees from the deli to attend any other employee meetings held by Jim Davis between January 1 and May 30; and that the meeting she attended was held in a small upstairs office which would only hold about 10 people. Reich testified that she was not directed to bring the employees in her department with her to the meeting. Mowery testified that he attended a meeting of employees in July; that Jim Davis presided at the meeting telling employees about the upcoming Union election; that there were about 10 employees present; and that he was called away from the meeting. Mowery also testified that during the 2 to 3 month period he did not hear Jim Davis state how he felt about Local 23, the Union campaign or the election.

going to have the police come and a State Police representative who came to the store told her that he was called; that between July 22 and the time they were prohibited from distributing handbills in the parking lot, between 2,000 and 2,500 handbills were distributed by the pickets; that from the time they were limited to the entrances to the parking lots, August, to November or Thanksgiving, the pickets distributed a total of about 100 handbills; and that the picketing continued from July to November.

Defibaugh picketed at Respondent's Hempfield store on July 22. She testified that three pickets were located at both of the two aforementioned driveways[80] and two pickets were allowed to handbill in the parking lot from the eight row from the front of the store to the street; that no one picketed on the sidewalk in front of the store; that the police came and they indicated that they had been called by Respondent; that, she estimated, for every 50 handbills they were able to distribute in the parking lot, they only distributed 1 handbill at the driveways; and that people pulling into the entrances would not stop, especially if there was a car behind them.

Harshell also picketed Respondent's Hempfield store on July 22 and on almost every day thereafter when there was picketing. He testified that for every 10 handbills handed out in the parking lot, only one was handed out at the entrances to the parking lot; that on the first day of handbilling, which occurred within 2 or 3 days of July 22, Steve Davis told the people passing out handbills in the parking lot that they should get out of the lot or he would call the police and have the people who were handing out handbills arrested; that Steve Davis was in charge of the specialty food in the

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80. Defibaugh estimated that the driveway off Route 136 is two car widths wide; and that the driveway off Janice Drive is a little wider. There is no sidewalk out by the driveway off Route 136. The picketers stood in the grassy area by the driveway.

store, "[h]e was considered a manager"; and that when Steve Davis brought the specialty foods in the store, he would tell the clerks to put it on the shelves without going through the clerks' supervisor. On cross-examination, Harshell testified that Steve Davis is in the Hempfield store about once a week for 30 minutes to 1 hour.

Toffolo testified that after the picket line went up he had to cut back the hours of employees in the meat department somewhat but he did not terminate anyone.

On July 25 Kunkle quit. She testified that she could not take the harassment any longer. Two other of Respondent's employees who were friends wih her, Tompkins and Emmanuel, told her that they were afraid to talk with her because they might be fired.

On July 25 the Board issued a complaint in Case No. 6-CA-19159 alleging that since on or about June 2 Respondent Davis has maintained a civil trespass suit against the Union in the Court of Common Pleas of Westmoreland County, Pensylvania, Civil Division, No. 3622 of 1986, which enjoins the Union from picketing on Respondent's Hempfield Township premises; and that Respondent engaged in this conduct to discourage its employees from joining, supporting or assisting the Union and engaging in concerted activities for the purposes of collective bargaining or other mutual aid and protection.

On August 2, according to the testimony of Harshell, a sheriff's deputy handed the pickets a document which indicated that they were no longer allowed on/in the parking lot. Subsequently, Harshell testified that this may have been the time that the deputy said that if they stayed in the parking lot they could be arrested. The pickets then took up stations at the entrances to the parking lot.

Appendix C

On October 25, 1988, Kula was interviewed by P.F. Kilker, who is an attorney with the firm which represents Respondent herein. Kula signed a statement which indicated that he had been assured that he would not be subject to any reprisals for anything he did or did not say and that he could terminate the interview at any time. Respondent's Exhibit 7.

On November 24, the Court of Common Pleas of Westmoreland County, Pennsylvania, in Davis Supermarket, Inc., Civil Action No. 3622 of 1986, issued a decision. As here pertinent, it reads in part as follows:

> On May 23, 1986 discharged former employees of the store, and other representatives of the Defendant Union, began picketing and handbilling activities at the supermarket for purposes of informing the consumer public that the employer was engaged in unfair labor practices. The number of pickets and their activities effectively impeded access to the store by customers.
>
> * * * * *
>
> On May 28, 1986, following the evidentiary hearing, the Court issued an order limiting the pickets to three in number, as well as prohibiting picketing on the employer's private property.
>
> Following the issuance of the Court's Order on May 28, 1986, the Defendant Union filed an unfair labor practice charge against the Plaintiff with the National Labor Relations

Board. According to Defendant's brief, this was done on June 2, 1986. According to Defendant's brief, on July 25, 1986 the NLRB issued a complaint charging the employer with engaging in unfair labor practices. The Defendant's brief indicates that the charge was that the Plaintiff violated Secion 8 (a) (1) of the National Labor Relations Act by denying the Defendant the right to peacefully picket the employer's premises for the purpose of informing the public of the employer's unfair labor practices. These charges are presently pending.

On July 29, 1986 the Defendants filed Preliminary Objections with the Court in which the claim is made that the Court's action is preempted by the NLRB and/or that the Court failed to take into account the proper accomodation principles with respect to the location of the pickets, pursuant to Federal Labor Law.

. . . . This Court has no knowledge of any proceedings before the National Labor Relations Board other than as represented by counsel for the Defendants. If the effect of Federal Law is to preempt this Court's action, then such preemption should be pursued through the Federal system.

With regard to the claim that this Court failed to take into account the proper accomodation principles with respect to the

> location of the pickets, in *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. 180 (1978), the Supreme Court noted that the union has a heavy burden in establishing a right to enter private property for trespassory union activity. In this case the evidence showed that the only store at that location is that of the Plaintiff and that the property is not quasi public as would be the case in a multiple tenant shopping center. The Defendants have not been enjoined from peacefully disseminating information by handbills, placards, or other means at the two entrances to the parking lot. The Defendants have not met their burden of establishing that it is necessary to go upon Plaintiff's property in order to effectively communicate their messages.
>
> Accordingly, the Preliminary Objections must be dismissed.

Around Thanksgiving 1986 Kaskie assertedly was informed that some pickets who were former employees were allowed back up on the sidewalk in the front of the store. Kaskie sent Defibaugh, Hershell, Shotts and Roy Biedrycki. A day or two later the pickets gave Kaskie notices they received which assertedly indicated that they were in contempt. The pickets were then moved to the entrances to the parking lot.

On November 24, the Monday before Thanksgiving, Defibaugh was picketing at Respondent's Hempfield store. She testified that Kaskie came to the site and told her that people who had been laid off were not allowed to go back up on the sidewalk in

front of the store and picket[81]; that when she picketed on the sidewalk by the front door of the store, Jim Davis came out and asked her what she was doing there; that the following day she again picketed by the front door of the store, along with others who had been laid off "probably like . . . Shotz [*sic*], Randy Hersel [*sic*], . . . Good [*sic*] . . . . [and] . . . a few others"; that they were allowed to have three people at each entrance to the parking lot; and that when one group was leaving for the day and another group was coming in and there was, therefore, six people there at the time, someone from the store would come out and take pictures.[82]

While Defibaugh picketed on November 26 at the entrance to the parking lot she was given a paper by the Sheriff's department which, according to Defibaugh, indicated that she and others[83] were in contempt of court and were no longer supposed to be in the parking lot. After that they picketed only at the entrances to the parking lot.

The above-described Pennsylvania court, upon consideration of Davis' Motion for Rule to Show Cause,[84] entered an Order, Joint

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81. Harshell corroborated Defibaugh's testimony on this point.

82. Harshell corroborated this testimony.

83. The others were Harshell, Shotts and Roy Biedrycki. Harshell corroborated Defibaugh's testimony.

84. The motion, which is dated November 25, alleges that Roy Biedrycki, Defibaugh, Harshell and Shotts, representatives, agents and employees of Defendant Union and acting individually or in concert with defendant Union, failed and refused to comply with and have disregarded the provisions of the Order of Court of May 28 by entering onto Plaintiffs property located at Route 136 and Janyce Drive, Hempfield, and distributing handbills at the doors of Plaintiff's facility, *by exceeding the number of pickets (three) permitted at each entrance to the Plaintiff's property* (Emphasis added); by parking their cars on Plaintiff's property and thereby depriving

(Cont'd)

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Exhibit 10, on November 26 granting the motion and ordering UFCW and Roy Bierdycki, Defibaugh, Harshell, and Shotts to show cause why they should not be held in contempt for violation of that court's above-described order of May 28.

On November 23, 1987, the Superior Court of Pennsylvania issued a decision in *Davis Supermarkets, Inc.*, No. 1736 Pittsburgh, 1986,[85] which reads, in part as follows:

(Cont'd)
customers of the use of such parking spaces; and by harassing store employees and customers. Davis asked the court to enter an order directing the Defendants to show cause why, among other things, they should not be fined an amount equal to the cost of Plaintiff's loses incurred as a result of Defendant's failure to comply with the Order of the court. The court left this language out of its show cause order but included all of the other language included by Davis in the prayer portion of its motion.

Defendant's response to the motion, Joint Exhibit 11, indicates that employees and former employees of Davis who were unlawfully discharged have been instructed by counsel for the Union that they have the right to peacfully distribute handbills and literature on the sidewalk area in front of the store publicizing the nature of their appeal directly to customers entering or leaving the store; that Defendants deny that they have harassed employees or customers of the store; that Defendants admit that they have stationed, at any one time, no more than two persons on the sidewalk area in front of the Plaintiff's store, for the express and limited purpose of distributing literature and handbills to customers and prospective customers approaching the store facility; that defendants admit that on occassion they have parked their cars on Plaintiff's property and are willing to remove the same assuming Plaintiff directs a request to said employees to do so; that picket signs are displayed on the bodies of pickets who are stationed at the entrances and exits of the employer's premises, not exceeding three in number at any one entrance or exit; and that since the Order of said Court, by the admission of Plaintiff's counsel and its representatives, does not apply to employees or former employees of Plaintiff, the conduct by these individuals does not constitute a deliberate and willful violation of the Court's Order.

85. Joint Exhibit 9.

Appendix C

* * * * *

> On May 23, 1986, appellants, employees and discharged former employees of the store, in conjunction with the United Food and Commercail Workers, Local 23 ("Union"), began peaceful picketing and distributing handbills at the store, alleging that Davis was engaged in unfair labor practices.
>
> On May 27, 1986, Davis filed a complaint in equity, alleging that the Union had trespassed and continued to trespass on its property, and seeking a preliminary and permanent injunction . . . . .

The Superior Court ruled that the order appealed from, the dismissal of Appellant's preliminary objections, neither effectively ended the litigation nor ended the entire case. Therefore, the order was not final and the court ruled that it did not have jurisdiction to consider the merits of appellant's appeal in the posture presented there.

Blaser started with Respondent as a security guard at its Mount Pleasant store in 1984. When that store was sold, he helped the night stock crews at the Greensburg and Hempfield stores on a part time basis, recommending changes to get it more organized. He did not discipline employees but rather reported them to their manager. As noted above, one of Blaser's duties is to relieve the Hempfield store manager when he attends the managers meeting, along with other managers at the Hempfield store, on Wednesday mornings in Greensburg. Also, if a member of the night crew was ill, he would fill in for a while. This happened rarely. In 1986 Blaser received minimum wage and no fringe benefits.

Appendix C

Neil Vario, who has worked as a bagger at Respondent's Greensburg store for the last 14 years, testified that in 1986 he worked for 3 or 4 months or longer at the Hempfield store. While he worked there, he punched the time clock at the Hempfield store but he used the same time clock number he used at Respondent's Greensburg store. Vario is a member of the Steelworkers and he did not notice any difference in his pay when he worked at Hempfield.[86] He testified that he did not know whether Steelworkers' dues were deducted from his paycheck while he worked at the Hempfield store.

Wigfield was hired by Respondent at its Greensburg store in 1975. She worked in the deli and her supervisor was Donahue. In 1984 she trained employees and waited on the counter in the deli department when the Hempfield store first opened. She testified that there came a time when the amount of time she spent at the Hempfield store decreased. While she worked at Hempfield she punched a time clock at the Greensburgh store. In the spring of 1986 her hours at Hempfield increased but she claimed that she did not know the reason. She claimed that she did not know how long she had been a member of the Steelworkers, and was not sure if she was a member of the Steelworkers in 1986. She recorded her Hempfield hours with her Greensburg supervisor up to a point in time when she began punching a timeclock at Hempfield. She claimed that she could not recall when she began punching a time clock at Hempfield. On cross-examination, she answered "Yes" to each of the following questions: ". . . is it your testimony that from 1984 even until today, you are spending some part of your work week at Hempfield," "[s]ometime it is a day and sometime it is more than a day," and "[s]ometimes it is three or four days."[87]

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86. He also worked at the Hempfield store just before the hearing herein.

87. At the time of the hearing herein she was spending 6 to 8 hours, one day a week at Hempfield.

Appendix C

Wilbur Albright has worked for Respondent since 1981 or 1982 generally as a heating, refrigeration, and air conditioning maintenance man. He works at whichever store needs maintenance or repair work. Normally he reports to Greensburg at the beginning of his workday. He keeps his own hours in a book and then transfers them to a time card, and he reports to Jim and Bob Davis. He is paid an hourly wage and he is not a member of the Steelworkers. He testified that he makes purchases of equipment of up to $1,000 on his own authority.[88] He decides how many hours he will work. And he decides depending on the problems, whether he would be working at Greensburg or Hempfield. Jim Davis does play a role in deciding the priority of Albright's work. Between 1984 and 1986 Albright worked basically 40 hours a week spending about a third of this time at Hempfield with the remainder of the time being spent at Greensburg.

Ann Howard was hired by Respondent at its Greensburg store in 1977. She worked in the deli department. In 1984 she began working at the Hempfield store periodically for a month when it opened. Subsequently she worked at Hempfield two or three times a week helping in the deli and training new employees. During one summer she worked at Hempfield for all of July and August. She could not recall if it was in 1986. She testified that in 1986 she worked in Hempfield two or three days a week between 6 and 8 hours a day. Up to some point in time she punched a time clock at Greensburg even on days she worked in Hempfield. She could not recall when she began punching a time clock at Hempfield. Howard has been a member of the Steelworkers for over 10 years

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88. In fact he ordered a $5,000 compressor without first discussing it with the Davis'. Normally though he would make a recommendation before the purchase is made. And in dealing with contractors, he would get an estimate if it involved more than a couple of hundred dollars and Jim or Bob Davis would make the decision.

and she is not paid a different wage when she works at Hempfield. At the time of the hearing herein she put in 6 to 8 hours maybe twice a week at Hempfield, and her total work week consists of 38 to 40 hours.

Stanley White was hired by respondent in April 1986 to drive a truck used to pickup produce from a broker in Pittsburgh, Pennsylvania and transport it to Respondent's Greensburg[89] and Hempfield stores. The truck is parked at the Greensburg store. White's supervisor works at the Greensburg store but he is also in charge of the produce department at the Hempfield store. White testified that he only has slight contact with the employees in the Hempfield store aside from his conversations with Allen Barber, who is in charge of produce at Hempfield; and that he never does any work at Hempfield other than unload the truck. White is a member of the Steelworkers at the Greensburg store. Dues are deducted from his paycheck and his wage is determined in accordance with the collective bargaining agreement between Respondent and the Steelworkers.

Shumaker was hired by Respondent in 1980 to work in its Greensburg store. He worked at that location until 1986. He is a member of the Steelworkers and has been since before 1986. In March or April 1986 his supervisor, Garlits told him to go to the Hempfield store to retrain the employees who were working there on how to bake from scratch. Shumaker testified that Garlits said that he would be there temporarily until the training process was over. When he arrived, he took over the ordering of products in the department. He testified that he was at the Hempfield store when Defibaugh and Good were laid off; that he did not even know that

89. Before the produce is unloaded at Greensburg, the bills are reviewed by Respondent's produce manager.

Defibaugh had the title of manager; that no one was named a new manager at Hempfield after she left; that he stayed at Hempfield for 1 year and 6 months; that he never heard her refer to herself or anyone refer to her as bakery manager; that he never referred to Defibaugh as bakery manager; that when he went to Hempfield he was under the impression that he would be in charge because he was going to be doing the training; and that he viewed Defibaugh as an employee working under him. There was no change in his wages or benefits while he worked at Hempfield and during that period he continued to have dues deducted from his paycheck for the Steelworkers.

Janet Barbour was hired by Respondent in 1971 to work in the Greensburg store. She worked as a bakery icer at Respondent's Mount Pleasant Store for 1 month before it closed. In January 1986 Garlits assigned her temporarily to work at the Hempfield store until she got someone trained to do her job. In the first 3 months of 1986 she worked 4 or 5 hours a week at Hempfield and the remainder at Greensburg. Later in 1986 she worked 3 days a week at Hempfield and 3 days a week at Greensburg. This went on for about 9 months. In February 1987 she worked 5 days a week at Hempfield. Barbour had more than one conversation with Garlits about the work at Hempfield being temporary because she liked working at Greensburg. While she continued to train employees in icing, no one liked the job. At the time of the hearing herein Barbour worked 34 hours at the Greensburg store each week and 6 hours at the Hempfield store. Sometime in March or April 1987 she punched a time clock at the Hempfield store. Before that she punched the timeclock at the Greensburg store and gave her Hempfield hours to her manager, Garlits. Barbour is a member of the Steelworkers and she was a member when she worked at Hempfield. Dues were deducted from her pay check and there was no change in her wages or benefits while she worked at Hempfield.

Appendix C

From January 1986 up until the time of the hearing herein Barbour had spent at least 1 day a week doing the icing at Hempfield.

Brian Mull was hired by Respondent in the middle of May 1986. He was a sophomore in high school at the time. After working a total of two days over two consecutive weekends in May, Mull was told by Allan Barber, his supervisor in the produce department at the Hempfield store, that he would not be working until school was let out for the summer because Barber wanted to train him during the daytime. Mull was never a member of the students cooperative education program. Mull checked the schedule for the produce department and he began working again the first week in July.[90]

Vicky Smartnik (Cramer in 1986) was hired by the Respondent in 1984 at its Greensburg store to work in the health and beauty aids department. She was assigned to work in the Hempfield store by her supervisor at Greenburg, Carol Millstein, a few months after she started working for Respondent. At Hempfield, she was stock clerk in the general merchandise and beauty aids department. She reported to the Hempfield store manager. When she first started at Hempfield, she worked 1 or 2 days a week for 2 or 3 hours.[91] Even when she worked at Hempfield, she punched her time card at Greensburg, both in and out, and she remained on the clock at Greensburg even though she spent part of the day at Hempfield. Her routine did not change up to the time she quit in December 1988. She took her direction from

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90. He got out of school in early June and he cut grass up to and after he began working at the Hempfield store.

91. Subsequently she testified that she worked 2 days and had a total of 8 to 10 hours.

Millstein and no manager at Hempfield told her what to do. If she needed something while working at Hempfield, she would go to the manager at Hempfield. One other Greensburg employee worked in her department at Hempfield, Stacy Wano. Also, a Hempfield employee, Sherry Ianni, worked in the health and beauty aids department. Smartnick testified that she did not really have any contact with the other employees at Hempfield. Also she testified that she did not have contact with the other employees who worked at Greensburg. She was not a member of the Steelworkers at Greensburg.

Pattie Hutton was hired in 1980 by Respondent to work as a cashier at its Greensburg store. She was assigned to work at the Hempfield store as a grocery price coordinator before it opened. She reported to the store manager at Hempfield. Approximately six other employees held the same job. Some of these employees, like her, worked part of the time at Hempfield and part of the time at Greensburg. After the initial start up period at Hempfield,[92] she usually worked at the store 1 or 2 days a week for 4 to 8 hours. Since about February 1986 she worked in Hempfield once every week or every other week. The Greensburg manager or one of the Davis' would tell her to go to the Hempfield store. When she worked in Hempfield she took her breaks in the snack room or the deli, the same as other employees. She never punched a time card at Hempfield but rather she punched in and out at Greensburg even on those days when she worked for some hours at Hempfield. She was not a member of the Steelworkers. An affidavit she gave to the Board contians the following:

During my time at Hempfield I had the

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92. She also helped start up Respondent's stores at Mount Pleasant, Pennsylvania and Frostburg, Maryland.

> authority to direct the employees there in how to do the job and they were expected to listen to me. I never had anyone question this authority.

Huton testified that with respect to direction, she just really explains to the employees if they have a question; and that she never disciplined or fired anyone.

Hribal (formerly Orange) was hired by Respondent in 1976 to work in the deli department at its Greensburg store. She was assigned to work at the Hempfield store in the seafood department when it first opened. She reported to Toffolo. She also worked in the deli department at Hempfield under Reich. At Hempfield she took her breaks in the restaurant in the deli where other employees also took their breaks. She testified that she worked at Hempfield until 1988, every week, two or three times a week. An affidavit she gave to the Board contains the following:

> Later on, I believe by sometime in 1985 I usually went to Hempfield one day per week. I worked there for about one or two hours checking seafood and making sure they were following what was being done at Greensburg.
>
> * * * * *
>
> I recall that about the time that Sonja Welsh in the deli and others at Hempfield were laid off I was working only with the seafood area because they had moved a department within a store and needed my help setting it up properly. For three or four weeks while I was doing this I worked 15 to 29 hours per week at Hempfield.

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> After that relocation was done instead of going back to my old pattern of coming to Hempfield only one or two hours per week to check on seafood I was scheduled for six hours one day per week to check on seafood and work as a clerk in the deli the rest of the day. That pattern has continued [to the time she gave the affidavit, March 5, 1987].

She is a member of the Steelworkers and while she worked at Hempfield she punched her time card at Greensburg.

Stacy Woodmancy (formerly Wano) was hired by Respondent in 1984. She stocked shelves in the general merchandise departments at the Mount Pleasant and Greensburg stores at the time. She was assigned to work at the Hempfield store before it opened and she continued to work there after it opened. One other employee worked in the general merchandise department at Hempfield, Vicky Kramer. When Woodmancy took her breaks, she took them in the same area as the other Hempfield employees; in the deli. In late 1985 and in 1986 she worked at the Hempfield store 3 days a week for 12 hours a week. She continued to do this at the time of the hearing herein. She was assigned to work at Hempfield by Millstein, who is the supervisor of health and beauty aids and general merchandise at Greensburg. There is no such supervisor at the Hempfield store. She would tell the store manager at Hempfield when she arrived to do work in that store and if there was any stock in the back the manager would tell her. Her affidavit to the Board indicates that Millstein told her that as soon as she could get someone trained for every day at Hempfield, she could return to Greensburg. The problem was that the employees who she trained would quit. In June 1986 she suggested to Millstein that they give up on the idea of training someone at Hempfield and she

would continue to work 12 hours a week at Hempfield. Millstein agreed. Throughout the time she worked at Hempfield she punched in and out at Greensburg returning to the Greensburg store after 10 pm from Hempfield to punch out. Millstein scheduled Woodmancy's days at Hempfield. Woodmancy has never been a member of the Steelworkers at the Greensburg store.

Kim Gallantine (formerly Reich) was hired by Respondent in February 1985 at the Greensburg store to work in the grocery department where she does price changes, and checks invoice and retail pricing. Her job title is systems. About one year later, Jim Davis assigned her to work in the Hempfield store full time for one month doing the same thing. Such assignment could have occurred as late as July. When she worked at Hempfield during this one month period she reported to Mowery and punched her time card at Hempfield. One other employee, Crivella, was assigned to do the same work at Hempfield. Others also helped out from time to time. She took her breaks in the deli. After the first month, Gallantine worked at Hempfield two days a week. Her store manager at Greensburg scheduled her hours at Hempfield. She receives her instruction on what to do at Hempfield from her store manager at Greensburg or Jim Davis and she punches the time clock at Greensburg. If she has a problem at Hempfield, she speaks to the manager at Hempfield. Prior to February 1986 Patty Hutton was doing the job Gallantine took over at Hempfield. Gallantine's March 5, 1987, affidavit to the Board contains the following:

> Until recently I went to oversee what those employees were doing and did none of the actual work. Recently an employee who was new to the job, Karen Davis, had been doing it and since she is still learning, I help her out by assisting with the work. In overseeing the

Hempfield store I can tell the employees there to make changes or whatever needs to be done.

Gallantine then testified "I can't remember . . . going there and not working. I am not their boss. I work with them." She does not have the authority to discipline employees if they do not follow her instructions. She is not a member of the Steelworkers. Also she testified that Hempfield employees Crivella, Werry, Karen Davis, and LeeWanna Shumaker have worked at the Greensburg store. She testified that about once a month one of the aforementioned Hempfield employees works at Greensburg; and that this does not occur on a regular basis.

Thomas Howard was hired by Respondent in 1979. Since 1984 he has stocked frozen food at the Hempfield store. More specifically, he spends 80 percent of his time stocking, 10 percent ordering and 10 percent checking in trucks. He orders the frozen food using a telex ordering machine and the tags on the shelves. How much he orders in based on his experience and he does not check with anyone else before placing the orders. He orders three times a week and the cost of the orders is between $2,000 and $3,000. He sees salesmen and he recommends new products to Jim Davis and Mowery. He reports to Mowery and he meets with Mowery regarding the frozen food ads. He can advise Jim Davis and Mowery regarding how much shelf space a particular item should have. No one else works in the frozen food department except when he asks Mowery, during busy periods, to give him a bagger to help him stock. When this occurs, he directs the person what to stock. If he has a problem with the employee, he tells Mowery not to send the employee again. On the average, Howard works 44 hours a week. He does not punch a time clock and he is paid a salary. He testified that he has never hired anyone; that he has never recommended that anyone be hired; that he does not have

the authority to hire; that he has never interviewed prospective employees; that he has never transferred employees from one department to another; that he has never recommended a transfer; that he does not have the authority to transfer or recommend transfers; that he does not have the authority to suspend or issue disciplinary warnings or recommend that it be done; that he does not have the authority lay off, or recall or make recommendations with respect thereto; and that he does not have the authority to promote or recommend promotion.

Attached hereto as Appendix B is a stipulation, received as Joint Exhibit 14 with a one-page addendum, which stipulation lists the employees who are or are not in dispute as to whether they are in the involved unit.

III. Discussion and Conclusions

Before treating the merits, certain post hearing motions must be handled. Respondent filed a reply brief on July 31, 1989. This occasioned a motion to strike by General Counsel, filed August 8, 1989, on the grounds that the Board's Rules and Regulations neither provide for such a filing nor did I grant special leave for such a filing. Respondent then filed a motion on August 10, 1989, requesting that its reply brief be treated as a motion or, in the alternative, that it be granted special leave for the filing of its reply brief. And General Counsel then filed a statement in opposition on August 14, 1989, pointing out that Respondent's aforementioned reply brief was filed approximately 2 months after the briefs in this matter were filed and requesting that if Respondent is granted leave to file the aforementioned reply rief, General Counsel also be granted leave to file a reply brief. As noted by General Counsel, the Board's Rules do not provide for the filing of reply briefs. Also, special leave was neither sought nor granted before such brief was filed. Accordingly, General Counsel's motion to strike be, and it is

hereby, granted. In my opinion, this is not the type of case which requires the filing of reply briefs. Consequently, Respondent's above-described August 10, 1989, motion be, and it is hereby, denied.

With respect to the alleged unlawful interrogation, General Counsel, on brief, contends that Sandy Reich's asking Welsh if she heard anything about the Union meeting which was supposed to be held at McDonalds was unlawful because at that time Welsh was not an open supporter of the Union nor was there any public action to suggest the presence of a union. Assertedly, Reich's inquiry, conducted in a background void of any evidence of open union activity, would by its very nature instill fear of possible discrimination. General Counsel argues that if the interrogation were truly not coercive Welsh would not have found it necessary to "exonerate herself by deceiving her manager." Respondent, on brief, contends that Reich, in connection with Welsh's termination, denied any such contact with Welsh; and that even assuming that Welsh testified credibly, there is no violation of Secion 8 (a) (1) of the Act since (1) the language carries no hint of coercion or interference, (2) the meeting occurred at Welsh's normal work station in the deli kitchen, (3) Welsh testified that she had a very good relationship with Reich and Reich was her friend and she, Welsh, could talk to Reich about anything, and (4) the alleged exchange lasted only for a moment and Reich did not press Welsh for an answer. On the last point, if the conversation occurred as described by Welsh, Reich did not need to press Welsh for an answer since Reich obtained an answer at the outset of the conversation. In my opinion, the conversation occurred exactly as described by Welsh. Reich did not specifically testify about this allegation. Rather, as pointed out by Respondent on brief, Reich testified that before her termination conversation with Welsh she heard nothing about the Union. Welsh impressed me as being a

credible witness and Reich did not.[93] Considering the factors described in *Rossmore House*, 269 NLRB 1176 (1984) and *Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217 (1985), namely, the background, the nature of the information sought, the identity of the questioner, the place and the method of the questioning and the totality of the circumstances, it is my opinion that the interogation was coercive. At this point in time Welsh was not an open and active Union supporter. Her less than candid response, as pointed out by General Counsel, itself is an indication of the coercive nature of the interrogation. As will be discussed below, this was not the only instance where Respondent violated the Act. On March 25 Respondent's management had notice that a union organizing drive was in progress.[94] In asking Welsh about the meeting Respondent violated Section 8 (a) (1) of the Act.

Regarding the allegation that Respondent created the impression among its employees that their Union activities were under surveillance by Respondent, General Counsel, on brief, cites Miscovich's testimony about a meeting of employees on or about May 12 where Bob Davis assertedly said that he knew that all of the employees there had signed UFCW authorization cards. General Counsel submits that pursuant to relevant Board law, *Romal Iron Works Corp. Degraw Iron Works Corp. and Empire Erector Corp.*, 285 NLRB No. 145 (1987), such a statement constitutes a patent violation of Section 8 (a) (1) of the Act, especially in view of the

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93. What either Welsh or Reich said or did not say during the termination conversation, in my opinion, would not necessarily be inconsistent with Welsh's testimony regarding this interrogation.

94. The assertion by some of Respondent's witnesses that they were not aware of a organizing campaign before the picketing and handbilling must be considered in the light of this interrogation and the fact that Davis received the above-described April 29 charge on April 30 and the above-described petition for an election.

fact that at that time neither Miscovich nor Kunkle were open supporters of the Union. Respondent, on brief, points out that Robert Davis only recalled two meetings of employees and the meeting in question was not one of them. Respondent goes on to argue that this allegation fits a pattern, namely, an uncorroborated incident totally out of character with the undisputed nature and scope of Robert Davis' duties at Hempfield. Miscovich's testimony is credited. Miscovich impressed me as being a credible witness. While Respondent's witnesses attempted to downplay the role of Robert Davis during this organizing campaign, the record, when considered as a whole, demonstrates that Robert Davis was a lot more active than Respondent would have one believe. This is just one instance. Others will be treated below. When Robert Davis told the employees assembled that he knew they signed authorization cards.[95] Respondent created the impression of surveillance and thereby violated Section 8 (a) (1) of the Act.

As noted above, it is alleged that Respondent unlawfully solicited employee complaints and grievances thereby promising its employees increased benefits and improved terms and conditions of employment. General Counsel, on brief, citing *Penn*

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95. It is noted that Miscovich testified that Buhl attended this meeting. As noted above, when Defibaugh asked Buhl to sign a UFCW authorization card, he informed her that he would not since he had been offered a co-manager's job at Respondent's Hempfield store. No UFCW authorization card for Buhl was introduced herein. It appears, therefore, that he did not sign a card. Apparently, this would mean that the statement that all of the employees there had signed cards would be inaccurate. It is not clear, however, what Buhl's position was at that time. Was he there as a co-manager, notwithstanding Miscovich's characterization of him as an employee? Did Robert Davis mistakenly believe that he had signed a card? Or was Robert Davis intentionally misleading the employees assembled? In view of this, there is not sufficient evidence to discredit this testimony of Miscovich.

Color, Inc., 261 NLRB 345, 406 (1982), contends that this occurred during Robert Davis' conversation with Black on May 15 when he told her that his door was always open and anytime the employees wanted to talk they were welcome to come in, and that he, Davis, took care of his own. Also, it is asserted that this occurred on May 12 when Robert Davis told Miscovich and other employees assembled that if there was any kind of a problem, if there was anything he could help the employees with, they should just ask. Regarding the former, Respondent, on brief, asserts that Black's testimony is uncorroborated. Contrary to Respondent's assertions, Kunkle did overhear a portion of the May 15 conversation between Robert Davis and Black. Kunkle and Black were testifying about the same conversation. Kunkle did not, however, overhear that portion of the conversation with which we are now concerned. Nonetheless, Black's testimony is credited. It is very specific. And Black impressed me as being a credible witness. On the other hand, Robert Davis did not specifically deny that he made either this statement or the above-described statement to Miscovich's group about helping the employees with their problems. As noted above, Miscovich impressed me as being a credible witness. Respondent violated Section 8 (a) (1) of the Act when it, through Robert Davis, engaged in the conduct described above.

With respect to the allegation that Respondent threatened its employees with store closure if they selected the Union as their collective bargaining representative, General Counsel, on brief, contends that on at least three occasions Respondent, by various agents, threatened employees with closure if the Union became their bargaining representative. Assertedly Kunkle was the employee involved in two of the threats and Black was told by Mowery on May 26 that Respondent would close the store. No record cite is provided by General Counsel for the alleged May 26

threat. And in reviewing the record I could not find the involved testimony. General Counsel points out that in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) the Court held that an employer may actually render a predication of the probable consequences of the unionization so long as the prediction is carefully couched in terms to convey to the employee an employer's belief of the probable consequences of the unionization as based on objective facts rendering the closure beyond the employer's control. It is contended by General Counsel that the involved statements were not couched in prediction type language but were affirmative declarations of a predetermined course of action; and that when the employee was told that Respondent would reopen and hire all new employees, she was being told that Respondent would be ridding itself of the Union and all those who supported the Union. Respondent argues, on brief, that Kunkle's testimony on this point is patently false; that the only two threats of store closure were allegedly made by two different supervisors to the same employee, in the same words, in the same location of the store, and in the absence of a single corroborating witness; and that Mowery's testimony contains the far more plausible version of the exchange between himself and Kunkle. Kunkle's testimony that manager Civiccio told her that Davis would close the store for a month and rehire all new people if Local 23 got in was not denied by Civiccio. Absent a challenge, one would be hard pressed not to credit Kunkle's testimony regarding the Civiccio statement. And Kunkle impressed me as being a credible witness. Kunkle, at that time, worked in the office in the front of the store. Civiccio also worked in the front of the store. It would not be unlikely, therefore, that she and Mowery, who was the store manager, would be in the office in the front of the store. The fact that similar words were used in the threats could mean nothing more than those making the threats were repeating something previously said to or by them. Mowery did not impress me as being

a credible witness. In his version, he assertedly told Kunkle that "it didn't matter . . . [to him] whether there was or wasn't a union." Mowery did not deny Porter's testimony that once when Porter was in the Hempfield store, Mowery followed him and eventually Mowery told Porter, after asking Porter if he needed help:

> Well Maybe you might need some help getting your ass the hell out of this store. I know what you are up to. Local 23 is trying to get into this store and the Davis' would do anything to prevent this even if it meant kicking your ass.

Does this sound like someone who did not care whether there was or was not a union at the Hempfield store? For this and for other reasons, I do not credit the testimony of Mowery. In threatening to close the Hempfield facility, Respondent violated Section 8 (a) (1) of the Act. *Air Products and Chemicals, Inc.*, 263 NLRB 341 (1982).

It is alleged that Respondent violated the Act by urging its employees to join the Steelworkers and by permitting the Steelworkers to utilize Respondent's facility, Respondent rendered aid and assistance to the Steelworkers. On brief, General Counsel contends that Robert Davis, on two separate occasions directed a group of employees to meet with representatives of the Steelworkers and to sign Steelworkers' authorization cards; that when one of the employees attending one of these meetings asked what the Steelworkers had to offer, Robert Davis ordered the employees to sign the cards, saying that the company was there to make money and not to argue the issues; and that Robert Davis's reaction to the employee's inquiry underscored the unlawful nature of the assistance to the Steelworkers. Respondent, on the unlawful nature of the assistance to the Steelworker. Respondent, on brief,

argues that "[e]ven . . . Kunkle testified that Robert Davis advised the employees that the purpose of Piccolo's visit pertained to cross training of Greensburg and Hempfield employees. (269)" On the cited page of the transcript, Kunkle testified that Robert Davis said that he was going to bring employees from the Greensburg store to the Hempfield store to train them. Kunkle did not testify on page 269 of the transcript that Robert Davis spoke about Piccolo's visit, told the assembled employees the purpose of Piccolo's visit or said that the purpose pertained to the cross training of Greensburg employees. Respondent also asserts on brief that:

> Piccolo's clear testimony was that neither Robert Davis nor anyone from . . . [Respondent] assisted him or the Steelworkers in organizing the Hempfield store. This conclusion is confirmed by the lack of any employee interest in the Steelworkers.

Taking the last point first, it is noted that on May 1 Kunkle, after being told by Robert Davis to sign the Steelworkers authorization card, did just that. She later retracted her authorization. Regarding the first point of Respondent's above-described assertion, Piccolo did not impress me as being a credible witness. He testified that he had asked Donahue and Don Miller to meet him at the Hempfield store to help him obtain Steelworkers authorization cards on the day he spoke with Robert Davis; and that he went to the Hempfield store to obtain Steelworker authorization cards. Nonetheless, according to his own testimony, he told Robert Davis that he was at the store to question employees on transfers. Piccolo testified that he lied to Robert Davis. Piccolo testified that he was concerned about members of the Steelworkers working at the non-union Hempfield store. Robert Davis, however, does not testify that he asks Greensburg employees at the Hempfield store to talk to

Piccolo. Rather, Robert Davis just assembles a group of employees, according to his testimony. As noted above, Robert Davis' role in Respondent's effort against the organizing drive, in my opinion, was quite different than he would lead one to believe. As I have already indicated, Kunkle and Black impressed me as being credible witnesses.[96] They were very specific and their testimony was logical. On the other hand, Robert Davis' testimony on this point was not logical. Kunkle's and Black's testimony is credited. The testimony of Piccolo and Robert Davis is not credited. Respondent violated Section 8 (a) (5) and (1) of the Act as alleged.

Next, it is alleged that Respondent changed the work schedule of Miscovich thereby causing his termination. As noted above, Miscovich is credited regarding he May 12 meeting at which Robert Davis told the employees assembled, including Miscovich, that he knew that they had signed UFCW authorization cards. General Counsel, on brief, contends that for six months Civiccio, who scheduled his hours, honored his requests to work the dayshift because of his second job; that Civiccio told him that Mowery was altering the schedule; and that where an employer because of an employee's union activities alters the schedule of that employee for the specific purpose of discomforting the employee with the knowledge that such discomfort will force the employee to leave his present employment it will be held to have unlawfully constructively discharged the employee, *Bennett Packaging Co.*, 285 NLRB 602 (1987). Respondent argues, on brief, that Mowery explained that extra employees were needed to work evening hours to cover the period surrounding high school exams and graduations, and customers had complained about having to bag

96. Kunkle's mistake about Black attending the same meeting on May 1 does not, in my opinion, undermine her credibility.

their own groceries.[97] Miscovich's schedule change occurred in mid-May. Mowery asserts that the change occurred in response to customer complaints which obviously had to occur before the schedule changes occurred in mid-May. In other words, it is Mowery's position that high school students in that area are graduating and getting ready to take final exams before mid-May. Other than Mowery's assertion, there is no evidence of record on this point. Mowery did not impress me as being a credible witness. Civiccio, who is the front end manager in charge of the cashiers and baggers, did not testify herein. When Miscovich asked her why he was being scheduled for evenings she, according to his testimony, said that she scheduled him for days and Mowery changed the schedule. Miscovich did not testify that Civiccio told him that he was needed to work evenings because of the high school graduations and final exams. Miscovich was the first witness to testify in the involved hearing. As noted, Civiccio did not subsequently testify that Miscovich had to work evenings because of the shortage of high school students, and that she told Miscovich that was the reason.[98] In forcing Miscovich to leave, Respondent unlawfully constructively discharged Miscovich and it violated Section 8 (a) (3) and (1) of the Act.

It is alleged that Respondent imposed onerous terms and

97. Respondent also cites two portions of Miscovich's affidavit to the Board in its attempt to discredit him. At one point Respondent asserts that the affidavit "revealed that his second job began just weeks before the scheduled change in April 1986." Miscovich testified that when he gave the affidavit he was not sure when he started the second job but subsequently his mother found his first paycheck from the second job, which paycheck indicated that he started October 1985. The other portion cited by Respondent refers to the mechanics involved when Miscovich did not appear for work. It is trivial, and it does not undermine Miscovich's credibility. It could, for the most part, merely hinge on the difference between figurative and literal.

98. The work schedule sheets, General Counsel's Exhibit 78, do not indicate, on their face that employees used as baggers were given time off for high school graduations and to prepare for final exams before mid-May.

conditions of employment upon Kunkle thereby causing her termination. On brief, General Counsel contends that to sustain a charge that an employee was unlawfully constructively discharged, it must be established that the burdens imposed on the employee caused and were intended to cause a change in the working conditions so different or unpleasant as to force the employee to resign, and that the burdens were imposed because of the employee's union or other protected concerted activity. *FOP Medical Computer Systems, Inc.*, 284 NLRB No. 117 (1987) and *South Nassau Communities Hospital*, 274 NLRB 1181 (1985); that as an office clerk, Kunkle dealt mainly with paperwork and was entrusted with a lot of responsibility; that in reassigning Kunkle to the meat department Respondent departed from its previous practice of obtaining Kunkle's consent to any reassignment; that Kunkle had never worked in the meat department before; that when viewed in the context of Kunkle's prior work experience and duties in the office, it becomes quite clear that the transfer was sufficiently odious to render her departure a foreseeable consequence; that there is a marked difference in the level of skill and responsibility involved between an office clerical and a meat clerk; that it is conceivable that such a transfer would be deemed a demotion by any reasonable person; that the duties Kunkle was permitted to perform as a meat clerk were more restricted than even the other meat clerks since she was instructed to just wrap meat; that to suggest that Kunkle was temporarily assigned to the meat department to fill in for vacations is contrary to Respondent's previous assertions that it could run the meat department with less hours because of increased efficiency; that Kunkle's selection does not logically follow since she was removed from the skilled office position at a time when the office itself was experiencing personnel shortages necessitating the training of a cashier for office work; that by this time Shotts, a fully trained meat clerk, had requested to return to work; that while Kunkle worked in the office she had access to and constant contact with a large segment of

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Respondent's employees, and as a meat clerk she had virtually no access or contact with the public and access only to the meat department employees; that due to Respondent's instructions that no one could talk to her except about meat, even the access to meat department employees was rendered useless[99]; that Kunkle's hours were reduced; and that it was no surprise that after two weeks of enduring this treatment with no foreseeable conclusion, Kunkle terminated her employment on July 26. Respondent, on brief, contends that Kunkle's transfer to the meat department was motivated by legitimate business considerations; that Kunkle possessed experience on the produce wrapping machine which is identical in operating to the meat wrapping machine; that Mowery obtained Kunkle's consent to fill in at the meat department; that while Kunkle portrayed the meat department as an isolated area, fellow employee Garris testified that employee and customer contact in the meat department was frequent; that while Kunkel painted a picture of an unappealing, bloody work area, Garris testified that she found the working conditions in the meat department to be pleasant; that Kunkle's contention that she resigned due to her reduction in work hours must be rejected since her hours coincided with the needs of the meat department and Kunkle never complained to any supervisor that she needed additional hours; that Duncan was not called as a witness to testify that Jim Davis told her not to talk to Kunkle; that General Counsel has failed to demonstrate that Kunkle's working conditions were made so difficult or unpleasant as to force her resignation, or that any change was related to Kunkle's union activities; and that absent a discriminatory motive, a mere reduction of hours does not

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99. It is contended by General Counsel that the record contains abundant evidence of Respondent's animus toward Local 23; and that Respondent's attitude toward Kunkle was demonstrated by Jim Davis on July 15 when he told assembled employees that he did not want them intimidated by "bullies and ringleaders" while staring directly at Kunkle and Black.

support a finding of constructive discharge. As noted above, Mowery did not impress me as being a credible witness. Kunkle, on the other hand, did impress me as being a truthful person. Mowery did not ask Kunkle if she was willing to work in the meat department before the assignment. This reassignment was involuntary. It resulted in Kunkle being paid substantially less. It resulted in Kunkle going from an office setting to a meat department setting after she had participated in the picketing of Respondent's store.[100] It resulted in her co-workers in the meat department not being able to talk to her unless it related to meat.[101] It resulted in her working at a job of which she did not know the duration since Mowery himself did not know the duration for sure.[102] It resulted in her performing a monotonous job and not being allowed to even put meat in the meat counter, a task which two employees in the meat department thought she should be able to perform.[103] And during this period Jim Davis, as noted by General Counsel, told a group of employees that they should not be intimidated by "bullies and ringleaders" while staring directly at

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100. After working in the front office it is understandable how Kunkle could be repulsed by the odor and the blood. The fact that Garris preferred working in the meat department over any other department in the store is taken into consideration when weighing her assessment of working in the meat department.

101. While Duncan did not testify, Jim Davis did testify. It is noted that he did not deny telling Duncan that she could only discuss meat with Kunkle.

102. Mowery testified that Toffolo did not give him an exact duration but he, Mowery, was sure it was only going to be a couple of weeks. Kunkle's testimony is credited that when she asked Mowery if she was going back to the front office, he did not reply.

103. Pomaibo actually gave her the task once and Garris testified that this was a task that an employee could learn in a day.

Kunkle and Black. In my opinion, it has been established that the burdens imposed on Kunkle were intended to cause a change in working conditions so different or unpleasant as to force Kunkle to resign. On July 26 Kunkle did just that. Respondent succeeded in forcing Kunkle to resign and at the same time it succeeded in violating Section 8(a)(3) and (1) of the Act.

It is alleged that Respondent threatened employees with unspecified reprisals if they supported the Union. General Counsel argues that when Robert Davis told a group of employees on May 1 that he would be very upset if they did not join the Steelworkers, he effectively issued a warning to sign Steelworker cards, not Local 23 cards, or incur the result of his wrath in the form of unspecified reprisals; that Davis told the gathering of employees that he wanted them to be one big happy family; and it was in their best interest to join the Steelworkers; and that in this context it is abundantly clear that Davis was threatening employees with unidentified retaliatory action if they refused to act in their best interest and consequently made him very upset. Respondent, on brief, contends that Robert Davis only recalled two meetings with the Hempfield employees during the time period involved herein and neither one involved what is described above. Black's testimony regarding the May 1 employee meeting is credited. Robert Davis made the statements alleged. And, as alleged, they amounted to a threat of unspecified reprisals if the employees did not support the Steelworkers but rather supported Local 23. By uttering this threat, Respondent violated Section 8 (a) (1) of the Act.

It is alleged that Respondent informed employees that their recall rights depended upon their refraining from activity on behalf of the Union. General Counsel, on brief, contends that Mowery's statement to Shotts, when she sought to be recalled, that nothing could be done with regard to her recall because of the union

situation unlawfully created an impression that her recall was conditioned on abandonment of the Union; that such statements are held to be independently violative of Section 8 (a) (1) of the Act, *Garmen Construction Company,* 287 NLRB No. 12 (December 14, 1988); and that in addition to exposing the layoff as unlawfully motivated, it is an unlawful interference with Section 7 rights. Respondent asserts that Mowery told Shotts that there was no need for her services pending resolution of a matter involving the Steelworkers; and that the reference was to the transfers being investigated by Picallo. As noted above, Mowery testified that he was not even aware that Shotts ever wanted to come back to work at the store. He is not credited. Nonetheless, Shotts' own testimony is that Mowery said that it was because of the union situation with the Steelworkers.[104] In view of this it cannot, in my opinion, be concluded that Mowery unlawfully created the impression that Shott's recall rights were conditioned upon abandonment of the UFCW. Accordingly, this allegation in the complaint will be dismissed.

The next allegation is that Respondent threatened employees that their Union organization activity was futile. General Counsel, on brief, points out that like threats, statements by an employer which indicate that organization is futile have long been held to unlawfully interfere with employees' Section 7 rights, *Holding Co.,* 231 NLRB 383, 288 (1977), *Atlas Microfilming, Division of Sertafilm, Inc.,* 267 NLRB 682 (1983), and *Kona 60 Minute Photo,* 277 NLRB 867 (1985). It is contended by General Counsel that on May 14 Robert Davis told Larry Miller and other assembled employees that the Union could not help them, and no one could

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104. Subsequently Mowery said that he could not say anything until the union business was settled. Apparently this was in reference to his earlier referral to the union situation with the Steelworkers. There is no basis in Mowery's statement to conclude otherwise.

except he and his family; that by making this statement Davis made it abundantly clear that even if the Union were supported by the employees, such support would be futile; that Robert Davis also threatened the futility of supporting the UFCW when on May 15 he told Black that he "would not have Local 23 in his store"; and that Robert Davis' unqualified statement to Black expresses the unequivocal refusal of Respondent to recognize and/or bargain with the Union under any circumstances and thus establishes to employees the sheer futility of organization. Respondent, on brief, argues that the cross-examination of Miller showed that neither Local 23 nor any other union was discussed by Robert Davis during the May 14 meeting; that none of the other employees named by Miller as attending the meeting corroborated his version of the meeting or even its existence; and that, regarding Black's testimony about her May 15 conversation with Robert Davis, "[i]t is highly improbable that Robert Davis intimidated employees, in assembly-line fashion, during one of his infrequent visits to Hempfield." It is my opinion that Black testified credibly on this issue. There was a conversation between Black and Robert Davis on May 15. Notwithstanding Respondent's assertions to the contrary, Kunkle did overhear a part of this conversation. She did not overhear the part involved in this allegation, but Black is credited regarding the full content of the conversation. By his own admission, Robert Davis did things regarding the Hempfield employees without first seeking the counsel of those who would be knowledgeable with respect to what could be done. In my opinion, on May 15 he did tell Black that he would not have Local 23 in his store. Also, Miller's testimony that Robert Davis on May 14 told some employees that nobody could help the employees except Davis and his family is credited. Robert Davis does not specifically deny that this meeting occurred. With respect to what was said at this meeting, Robert Davis did not impress me as being a man who was that cautious about what he said or did during this period. He

had built this business up over a period years and understandably he took pride in this. Apparently, Robert Davis viewed what was occurring as a threat to his business and he reacted at least in some instances as noted above, without first seeking counsel from those knowledgeable in such matters. Indications of futility inherently undermine employee Section 7 rights and are, therefore, a violation of Section 8 (a) (1) of the Act.

It is alleged that Respondent threatened employees by accusing them of disloyalty for supporting the Union. General Counsel, on brief, argues that it is well established that where an employer equates engaging in protected concerted activities with disloyalty to the employer, it has violated Section 8 (a) (1) of the Act, *Lionel & Sullivan and Ralph A. Fattore, a partnership, d/b/a Toyala,* 276 NLRB 999 (1985) and *Viracon, Inc.*, 256 NLRB 245 (1981); and that on May 15 when Robert Davis told Black, as overheard by Kunkle, that he was unhappy that some of his employees were going behind his back to join Local 23, he unlawfully equated disloyalty with seeking representation. As noted above, Respondent, in effect, contends that it highly improbable that such conversation occurred. Both Kunkle and Black testified about this statement. Their testimony is credited. As noted above, it is my opinion that Robert Davis overreacted in his response to the attempt to organize "his" employees. Accordingly, Respondent violated Section 8 (a) (1) of the Act.

Allegedly that Respondent unlawfully laid off Garris, Hilty, Shotts, Welsh, Defibaugh, and Good, on or about April 19 and refused to recall them. On brief, General Counsel argues that it is undisputed that all of the April 19 alleged discriminates had at least signed UFCW authorization cards prior to their discharge; that Welsh and Shotts solicited UFCW cards and support from employees while on the Employer's premises; that Welsh was

unlawfully interrogated by her immediate supervisor concerning the Union just one month before her discharge; that Shotts had previously discussed the possibility of being represented by a union with her supervisor; that Good had been openly critical of Respondent's wage rates; that Hilty had signed her authorization card and returned it to another employee while at work at Respondent's premises just one week prior to her discharge[105]; that Garris initially spoke with Porter while on duty at the seafood counter directly across from and in plain view of the manager's office window, and at that time Porter's involvement in the campaign was known to Respondent; that supervisor Elda told Defibaugh on April 19 that "they heard the union was getting close to the number they needed for an election and they were getting rid of the troublemakers and the people with attitude problems"; that the discharges of Shotts, Welsh, Good, Hilty and Garris were part of an overall scheme to thwart Local 23's organizing drive; that Respondent's animus toward Local 23 is abundantly clear from the numerous threats, other various violations of Section 8 (a) (1), and the Respondent's unlawful support and assistance to the Steelworkers' belated effort to organize the Hempfield store; that the Board has held that proof of an employer's knowledge of union activity may be established by circumstantial evidence, including the timing of the discharges, the pretextual or summary nature of the discharges, and the shifting or contradictory explanations of the discharges, *BMD Sportswear Corp.*, 283 NLRB 142 (1987), *Culmtech Ltd.*, 283 NLRB 163 (1987) and *Dutch Boy, Inc.*, 262 NLRB 4 (1982); that an analysis of General Counsel's Exhibit 69 and the testimony, together with Joint Exhibit 15, which lists the employees' department, establishes that departments other than bakery and deli began to see an influx of 'Greensburg people' beginning as early as the payroll week ending April 26; that such

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105. As noted above, Hilty's card is dated "April 1986."

Appendix C

'Greensburg people' include Linda Hummel, a cashier, Robin Ross, night crew, and Don Miller, James Weaver and Lisa Warmick, all of whom worked in the meat department; that while Jim Davis may have talked of a consolidation in the past, he took no action until late April when Respondent believed that the Union was getting close to the number needed for an election; that the increased appearance of 'Greensburg people' who are represented by the Steelworkers coincided neatly with respondent's May 1 efforts to thwart Local 23 in favor of the Steelworkers; that two of 'Greensburg people' allegedly working at Hempfield were officers of the Steelworkers, Donahue and Don Miller[106]; that it is absurd to believe that the decision to consolidate by Jim Davis just happened to occur at the very same time two supervisors, independently of each other, determined to lay off personnel for economic reasons and at the same time discharge others for cause; that the complete lack of any documentary evidence of either the decision to consolidate or its implementation underscores the implausibility of the scheme as a legitimate business decision; that it is improbable that, as testified to by Reich and Mowery, a decision to consolidate was reached without consulting with the supervisors who would implement such a decision; that Defibaugh was not a supervisor in that the evidence lacks any indicia that she responsibly directs the work of others, exercised independent judgment, or had the authority to effectively recommend any change in an employee's status; that contrary to the other layoffs which were occurring at the time, Defibaugh's was not handled by her departmental supervisor; that her departmental supervisor did not even know the reason for her layoff until some time after it occurred; and that a failure to consult with a supervisor is an

106. Donahue is the deli supervisor at Greensburg. Assertedly, this demonstrates the implausibility of propositions that she was dual-function employee or present at Hempfield for any other reason than to garner support for the Steelworkers.

indication that pretextual reasons are being advanced for a discharge to shroud an employer's unlawful motivation in legitimacy, *Virginia Apparel Corporation*, 264 NLRB 207 (1982).

Regarding these alleged violations of Section 8 (a) (3) and (1) of the Act, Respondent contends that it had no knowledge of the union activity by any employee prior to May 1986; that Reich denied participating in any conversation concerning any union prior to the date Welsh was let go; that Welsh was let go by Davis because beginning in November 1985 an unacceptable number of complaints were received concerning food prepared by Welsh; that notwithstanding the fact that during the Memorial Day weekend Welsh picketed the Hempfield store on behalf of Local 23, she was later asked by Respondent to return to work; that she declined assertedly because Davis could not guarantee 'permanent' employment; that the facts show that Hilty's termination was a performance related termination of a short-term employe[107]; that an incident involving both Hilty and Smith triggered the decision by Reich to terminate both employees; that General Counsel's proof as to Respondent's knowledge of Garris' union activity is preposterous in that Garris had no way of knowing what manager, if any as in the office one-way glass across the store at the time she spoke to Porter; that the record is clear that it was the combination of a decline in business in the meat department and Garris' performance problems — not any union activity — which caused Garris' termination; that Toffolo testified credibly that there was simply not enough work to go around, and faced with the inevitable termination of employees, Toffolo concluded that Garris should be let go; that Garris was the least senior meat department employee,

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107. Respondent also asserts that on its face, Hilty's authorization card, which for a date indicates only "April 1986" raises serious questions whether it was even signed prior to Reich's decision to terminate Hilty.

and she admitted that she had mispriced meat, a deficiency which Toffolo counseled her to correct; that Toffolo directed Garris to call him in a few days concerning the possibility of being recalled and Garris' failure to follow through on this direction, rather than any anti-union motivation, caused the permanent discontinuance of her employment; that Shotts initiated the idea of taking a leave of absence from work on April 17; that instead of a leave of absence Shotts was, with her consent, let go with the understanding that she could collect unemployment compensation and there was no guarantee that work would be available if she later decided to return to work; that the Hempfield bakery experienced a number of problems in its conversion from a frozen baking operation to a scratch baking operation; that on April 16 Shumaker stated at a meeting attended by Mowery, Garlits and Defibaugh that Good's attitude was poor and in view of all this James Davis made the decision to terminate Good; that Elda denied the above-described comment she allegedly made to Defibaugh on April 19 regarding Respondent getting rid of all trouble makers and people with attitude problems; that Defibaugh's version of these events — that she never told Good, a personal friend, about a comment directly linking his termination to his union activity — defies belief; that the plainest indication of Defibaugh's supervisory status was her action prior to the April 19 bakery department layoff when upon learning that three employees were to be let go, she sought to persuade first store manager Mowery and later Garlits that some all of these employees should be retained; that as a direct result of Defibaugh's efforts, Barbrow's scheduled termination did not occur; that such effective recommendation concerning a "termination" decision is a clear indication of supervisory status, *Big Bear Super Markets,* 169 NLRB 94 (1968); that Defibaugh exercised significant control over the assignment of work within the bakery department; that she alone decided how many hours per week to schedule each employee, which employees would receive

days off on Sundays, holidays and other special requests, and which requests for specific work shifts would be honored, and she assigned overtime work, *Food Mart,* 162 NLRB 1420 (1967), *Food Marts, Inc.* 200 NLRB 18 (1972) (allocation of hours), *Gerbes Super Market, Inc.,* 213 NLRB 803 (1974) (granting permission to leave work early), and *Kroger Co.,* 228 NLRB 149 (1977) (scheduling); that other indicia of supervisory status include the fact that, where a particular individual would be found not to be a supervisor, employees would otherwise be without a supervisor, *Lukes Supermarket, Inc.,* 228 NLRB 763 (1977), Defibaugh received a higher rate of pay than the other employees, she ordered product using her discretion with respect to seasonal and holiday periods, and she held the title of manager; that because Defibaugh was at all relevant times a supervisor within the manning of the Act, the allegations must be dismissed with respect to her on that basis along; that notwithstanding Defibaugh's supervisory status, Respondent's termination of her would have still been proper in that Davis had no knowledge of Defibaugh's union activity prior to her termination and the reason for Defibaugh's termination was entirely performance related; and that Defibaugh's shortcomings were being magnified by the conversion to a scratch bakery at Hempfield, a skill which she did not possess, and under the circumstances, James Davis made the pure business judgment to terminate Defibaugh and consolidate bakery operations.

Taking the last-named discriminatee first, Good, Defibaugh is credited regarding what Elda said on April 19, namely, that Respondent was concerned that the Union was getting close to the number it needed for an election and Respondent was going to get rid of all the "troublemakers and people with attitude problems." Elda, the assistant store manager, Mowery's right-hand person, was in a position to know. While technically Defibaugh was not a

supervisor, as discussed below, Elda viewed her as a manager because Defibaugh held the title of manager. Elda is not credited; she did make the statement. The statement explains why Respondent did what it did on or about April 19. This conclusion is bolstered by the fact there is a complete lack of documentary evidence regarding the alleged consolidation and any performance problems on the part of any of the involved employees. By all accounts Good was a good employee. Before this he had been rehired by Respondent after he voluntarily left. The only bad thing said about him was said by Shumaker, viz., that he had a bad attitude. Shumaker was present when Good discussed the Union. And Shumaker was present when Good gave signed UFCW authorization cards to Welsh to turn into the Union. Defibaugh said that Good did not have a bad attitude but he thought he should be paid more for the job he was doing. Garlits and Mowery both were surprised indicating that they were not previously aware that Good had a bad attitude. As noted above, Respondent, on brief, asserts that the bakery department was having problems and Shumaker said that Good had a bad attitude so Jim Davis decided to terminate Good. There is no indication that Jim Davis discussed Good's alleged bad attitude with Garlits, Mowery and Defibaugh. There is no indication by Jim Davis of exactly what the problems were in the bakery department and how Good was responsible for the alleged problems. Mowery did not deny that he told Defibaugh that no one could understand why Good was being laid off. Respondent violated Section 8 (a) (3) and (1) of the Act when it laid off Good because he engaged in union activity.

At the time Jim Davis decided to lay off Good, apparently he did not decide to lay off Defibaugh because Garlits originally said only Good, Barbrow and Roadman. Respondent, on brief, asserts that Defibaugh's termination was entirely performance related. It would seem, therefore, that if Defibaugh's layoff was entirely

performance related she must have performed poorly between the time Jim Davis told Garlits to layoff Good, Barbrow and Roadman, and when she was laid off. What did she do? She expressed her disagreement with the layoffs speaking not only to Elda and Mowery but going to Greensburg to speak to Garlits. Elda made a damaging admission to her. What else happened? Defibaugh tried to see Mowery but he was meeting with Napoleon and he would not let her in the office. One of the employees who Defibaugh spoke to about signing a UFCW authorization card was Napoleon. There is nothing in this record which demonstrates that there was any legitimate performance problem with Defibaugh either before or after Garlits spoke to her about laying off Good, Barbrow and Roadman. Shumaker said nothing derogatory about her performance. Indeed it appears that he was surprised about her layoff. He did not deny that Garlits told him that she, Defibaugh, walked off the job. Mowery testified that Jim David told him to lay off Defibaugh because the bakeries were being consolidated. When James Davis testified, he testified that he made the decision to lay off Defibaugh and Good "[b]ecause we had problems in the bakery." On April 19 and the morning of April 21 Garlits told Defibaugh he did not know why she was laid off. Finally, around noon, after Jim Davis managed to avoid a telephone conversation with Defibaugh, Garlits told Defibaugh that business was slow, Respondent was going to consolidate and they were laying off some people. But, as noted above, Jim Davis testified herein that Defibaugh was laid off because there were problems in the bakery. Which is it? It is neither. Garlits said on April 21, after indicating that it was the consolidation, that he could not understand why Defibaugh was laid off.

Respondent argued that Defibaugh is a supervisor. Defibaugh may have had the title of manager but, contrary to Respondent's assertions, she was not a supervisor within the meaning of the Act.

Appendix C

From before she began her tenure as "manager" of the Hempfield bakery until she ceased working for respondent, little changed regarding Defibaugh's position. It would appear that if she had not asked for the title she would not have been given it. She performed most of the same functions before she had the title as she did once she obtained the title. She did receive 30 cents an hour more in her paycheck but she still punched a time clock unlike the other actual supervisors in the store. Shumaker, who was brought into the Hempfield bakery from Greensburgh did not even known Defibaugh had the title of "manager." He testified that while he and Defibaugh were there, he, not she, was in charge [108]; that he never heard her refer to herself or anyone refer to her as bakery manager; that he never referred to her as bakery manager; that he viewed Defibaugh as an employee working under him; and that after Defibaugh left, no one was given the title manager. Considering the record, Defibaugh did not have the authority to effectively recommend hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, or disciplining.[109] Respondent violated Section 8(a) (3) and (1) of the Act when it laid off Defibaugh because she engaged in union activity.

Just as Jim Davis decided the bakery layoffs on his own, so too he alone decided to lay off Welsh from the deli department. Again, he claims that the layoff was performance related. But the deli

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108. Respondent argues that Shumaker is an employee and should be included in the involved unit.

109. Regarding Respondent's assertion that as a direct result of Defibaugh's efforts on April 19, Barbrow's scheduled termination did not occur, it is noted that all that was achieved on April 19 was that Mowery said that Barbrow would be left on the schedule and the following week she would be let go. Defibaugh was laid off on April 19. If Respondent changed its position on Barbrow, Defibaugh was not even there when it did and she played no role in Respondent's changing its position.

departament manager, Sandy Reich, disagreed asserting that Welsh's performance did not warrant the layoff. While Jim Davis disagreed with Reich on April 19, assertedly he reversed his position in mid-June telling Reich that he trusted her judgement, at least in June, and she could bring Welsh back. According to her own testimony, Reich told Welsh that she was being laid off because Respondent was consolidating the Greensburg and Hempfield stores. Jim Davis testified that he decided to let Welsh go because there were problems in the deli with the food being prepared. Welsh testified that she was never criticized about her work performance, she never received a verbal or a written warning and she was never suspended. Respondent does not assert that Welsh was ever suspended. Respondent did not introduce any written warning regarding Welsh's performance so it would appear that Welsh was being truthful on that point. Reich does not specifically deny that on April 19 she told Welsh "[w]hen you are a manager you are kind of like as puppet, you do whatever they tell you to do. I really don't want to do this, but I have to do it." If as Reich now asserts, there were numerous complaints which she had already discussed with Welsh, and which, according to Jim Davis were the reason for the layoff, why did Reich tell Welsh that she was being laid off because of the consolidation? Reich did not receive the alleged complaints directly from customers. Rather Jim Davis allegedly told her that there were complaints. Mowery, who is the store manager, and Elda, who is the assistant store manager did not tell Reich that there were complaints. Interestingly, Jim Davis, who was dividing his time between the Greensburg, Frostburg and Hempfield stores was the person who assertedly received these complaints. And what were the specific complaints? Assertedly the pieces of potato in the potato salad were not uniform in size and the chicken noodle soup was too salty. Reich testified that Welsh made an attempt to conform to the requests that Reich made. Regarding the soup, that would mean that Welsh would reduce the amount of salt. Regarding the potato salad, Reich

testified that the problem arose because Welsh did not use the available machine to cut the potatoes but rather cut them by hand, which was faster. If Reich spoke to Welsh about this, why would Welsh not thereafter use only the machine to cut the potatoes? Again, Reich testified that Welsh made an attempt to conform to the requests made. If this is true, was the machine to blame for cutting the potatoes for the potato salad a different size. Would Welsh have intentionally disregarded Reich's instructions when Welsh would have had to know that the proof of the consistency of the potatoes would be in the potato salad which would be in the counter for all to view. Welsh is credited. She was never told about any problems regarding her performance. Welsh asked Reich on April 19 if her layoff had anything to do with the Union. It is my opinion that it had everything to do with the Union. Welsh was laid off because of her union activity and once again Respondent violated Section 8(a)(3) and (1) of the Act.

Obviously, I do not find Sandy Reich to be credible witness. As here pertinent, she also testified about a termination she made in the deli department. Assertedly, she made the decision to terminate Hilty, along with Smith, on her own without discussing it with Jim Davis or Mowery. Reich testified that she previously discussed with Hilty the fact that she left things undone, left the counter area messy and dirty and called in sick too often. Welsh testified that Hilty missed a lot of work and Reich was upset with her because it was difficult to get someone to replace her. Hilty testified that Reich never indicated to her that she called in to many days. There is no documentary evidence of any kind of a warning to Hilty regarding calling in sick. Reich testified that she was unhappy with Hilty's performance, along with Smith's, at the beginning of the week and Reich decided at the end of the week that she was going to terminate Hilty and Smith. Reich testified that she did receive customer complaints about Hilty's attitude. According to Hilty, this was the reason Reich gave for terminating her. Also, according

to Hilty, Reich refused to tell her what the customer said. As noted above, Elda told Defibaugh at 8am on April 19 that Respondent was getting rid of the trouble makers and people with attitude problems because Respondent believed that the Union was getting close to the number it needed for an election. Hilty is credited. It appears that she may have had an attitude problem with respect to calling in sick. But before April 18 it did not result in her even receiving a written warning. Some time that week, Respondent decided who the troublemakers and people with attitude problems were. Hilty was included in that group. But Reich could not tell her that this was the reason for her layoff. Reich did not tell Hilty her calling off sick was the reason. Hilty testified that Reich specifically told her that calling off sick was not the reason for the layoff. Hilty is credited. As noted above, Reich testified that she was unhappy with their performance at the beginning of the week and she decided at the end of the week that she was going to terminate them. What did Hilty do at the beginning of the week? Reich testified that she could not remember if Hilty and Smith had switched assignments or if both of them had called off. Hilty did not call off at the beginning of the week. Rather, Hilty filled in for someone else at the beginning of the week. Reich testified that it was her policy to have employees discuss switching assignments with her before they made the switch. There is no evidence that Hilty and Smith switched assignments at the beginning of the week. Hilty worked for someone else who called in sick. So there was no violation of Reich's policy at the beginning of the week. In my opinion, the timing, shifting reasons, and the summary nature of this layoff demonstrates that it was part of Respondent's scheme to rid itself of employees who were troublemakers or had attitude problems during this organizing campaign. Respondent wanted to send a message to the employes that week with the layoffs. It did. In my opinion, but for the Union organizing campaign, Hilty would not have been laid off at that point in time. Respondent violated Section 8 (a) (3) and (1) of the Act.

Appendix C

As noted above, there were also layoffs or discharges in the meat department on April 19, Shotts and Garris. Assertedly, Toffolo, who usually clears hiring for the meat department with Jim Davis or Brady, decided himself to lay off two employees because allegedly he did not have enough payroll hours to go around. According to Toffolo, he told Jim Davis that he, Toffolo, had to cut back on his work force. But according to Toffolo, department hours were only reduced by 20 to 25 hours with the departure of the two employees because their hours were redistributed among other employees in the meat department. And after Shotts and Garris left, some employees from Respondent's Greensburg store came to work in the meat department at the Hempfield store. This was a part of Respondent's scheme to rid itself of troublemakers and people with attitude problems. Shotts was a likely candidate because she wanted to be able to take some time off but she wanted to be able to return to work. Also, in April 1985 Shotts asked Toffolo and Shebilsky about getting a union in the store. At the time she was told that she should not talk to anyone about it or she would not be employed at Respondent's store anymore. Toffolo's testimony that he did not recall this conversation is not credited. As noted above, Shotts signed a UFCW authorization card and she spoke to other employees about signing UFCW authorization cards. Toffolo was correct when he testified that Shotts was discharged. She was not discharged because she did not ask again to come back after Mowery told her he could not take her back at that time because of the of the union situation with the Steelworkers. Shotts was discharged because Respondent, notwithstanding what Shotts was told, never had any intention of taking her back. What she asked for and what she received were two different things. Respondent violated Section 8 (a) (3) and (1) of the Act on April 19 when it discharged Shotts and when it refused to recall her.

Appendix C

Toffolo told Garris that Respondent was having some money problems and they had to lay off some poeple. As noted above, according to Toffolo, Garris' layoff, along with Shotts', reduced the department hours by a total of only 20 to 25 hours since their hours were redistributed among the other employees in the meat department. In view of this, was there a need to lay off two people or would one person have been enough? Shotts had volunteered, under the impression that she would be able to return at some time. If it had been lawful, would not Shotts layoff have been enough?[110] Garris completed her 90-day probationary period. Toffolo, however asserts that she was pricing meat wrong on a "regular basis." Garris testified that all of the women in the meat department price meat, and, therefore, Toffolo would have had to speak to them all. General Counsel, on brief, contends that since there is no identifying mark on the meat to indicate who priced it and there is frequent interchange of clerks pricing the meat, the purported performance problem, mispricing meat, is not easily attributable, if at all, to one specific individual. Toffolo alleged that Garris had a tough time catching on to the system. If that was the case, why was not something done during her 3-month probationary period? As noted above, there is no documentary evidence whatsoever regarding any shortcomings in Garris' performance. Garris had the least seniority and if there was actually a need for a layoff and it was done strictly on a department seniority bais, Garris would have been the logical choice. But it has not been demonstrated that there was a need to lay off Garris. During the Union campaign Porter spoke to Garris in the store. And Mowery did not dispute the fact that he not only knew who Porter was but he had words with Porter in the store. It is not clear, however, when this occurred. Nonetheless, when all of the factors are considered, including the

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110. The testimony that another employee in the meat department had just given two-weeks notice was not refuted.

timing of the layoff, the failure to demonstrate that there was an actual need for this layoff, the questionable nature of the alleged performance problems, and the fact that Respondent engaged in numerous anti-union actions, in my opinion Respondent violated Section 8 (a) (3) and (1) of the Act in laying off Garris.

It is alleged herein that Respondent acted unlawfully in discharging Larry Miller and refusing to recall him. General Counsel, on brief, contends that subsequent to the April 19 discharges, Respondent, in furtherence of its grand design to quash support for Local 23, discharged Larry Miller on May 14, that Mowery saw Miller speaking to Porter in the parking lot of the Hempfield store; that Miller discussed the Union with other high school students; that while Respondent alleged that it had a pilferage problem in the 'breakroom area,' it targeted only Larry Miller and Campana for investigation; that all employees had access to the area and the entire night crew of six to eight employees worked in the area virtually unsupervised; that about 2 months after Miller's discharge, the full night crew was discharged for precisely this reason; that while only Mowery met with Campana and while Mowery accepted Campana's denial without investigation, Miller met with Mowery and Elda was present as part of Respondent's practice to have two supervisors present during a meeting when disciplinary action is anticipated or already decided; that during the interview Mowery did not ask Miller if he had purchased the items before consuming them; that employees are allowed to purchase items from the floor as well as from vending machines as long as they maintain the sales receipt while they are consuming the item; that while Mowery said that he had observed Miller a few days prior to the interview 'clowning around' and eating and drinking in the receiving area, Mowery did not confront Miller at that time when he was required to have in his possession a sales receipt; that instead Mowery waited a few days

when it was highly unlikely Miller could establish that he had purchased the items; that it appears that Respondent actually avoided any true investigation; and that given the summary nature of Miller's discharge and the complete lack of foundation for the conclusion that he had consumed the items without purchasing them, it must be concluded that Respondent terminated Miller because of his support for Local 23. Respondent, on brief, argues that Miller failed to mention in the affidavit he gave to the Board shortly after his termination, that he was ever observed by management talking to Porter; that Porter himself recalled no such occasion when he was observed by management [111]; that even if Mowery had observed Miller and Porter together, that fact would be insufficient to establish knowledge on the part of the employer; that any inference of knowledge from a group meeting with Robert Davis is similarly flawed since neither Local 23 nor any other union was discussed; that none of the five other employees named by Miller as attending the meeting corroborated Miller's version of the meeting or even its existence; that the sole reason that Miller's employment was terminated was that he admitted in the presence of Mowery and Elda that he had eaten merchandise without paying for it; that this violated a well-established store policy that required that all items consumed on the premises be purchased and the receipts retained; and that Miller's defense, namely, that he in fact paid for the merchandise, was never mentioned in his Board affidavit and is plainly fabricated.

According to his own testimony, Mowery did not first ask Miller, a high school student at the time, if he had paid for what he had consumed or just took the items. Rather, Mowery asked Miller if he had eaten the contents of the packages he, Mowery, had in front of him or drank any of the soda. When Miller said yes

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111. This does not accurately reflect the record.

Mowery told him that he was fired. Elda's testimony that Mowery asked Miller if he consumed any of the items "without paying for them" is not credited. It conflicts with Mowery's testimony. Miller testified that he told Mowery at the time that he did not steal the items. His testimony is credited. He may not have indicated specifically that he or someone else paid for the items but I believe that he told Mowery that he did not steal the items. There were employees other than Campana who could have consumed the involved items. Yet Mowery did not question them. And Mowery did not ask Miller if he or someone else paid for whatever was consumed. Mowery only asked Miller if he had consumed any of the involved items before telling him that he was fired. Mowery does not assert that Miller consumed all of the involved items. In my opinion Mowery was not really interested in finding out who consumed all of the involved items. Rather, with his rush to judgment, Mowery, in my opinion, was looking for any justification, even it is was without merit, to fire Miller. Respondent violated Section 8 (a) (3) and (1) of the Act in terminating Miller.

Since the Board requires the application of the analysis in *Wright Line*, 251 NLRB 1083 (1980) notwithstanding the fact that all of the above-described discharges, which includes the permanent layoffs, were purely pretextual, it is concluded that the reasons advanced by Respondent either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

There are a number of complaint allegations regarding the picketing and handbilling. More specifically, it is alleged that Respondent violated the Act (A) in making verbal announcements and through the assistance of the Pennsylvania State Police

discriminatorily refusing to permit the Union to picket and handbill on Respondent's Hempfield Township property while permitting other organizations access to its property for purposes of soliciting its customers and related activities, (B) in maintaining a civil trespass suit against the Union in the Court of Common Pleas of Westmoreland County, Pennsylvania, which enjoins the Union from picketing on Respondent's Hempfield Township premises, (C) in threatening to have persons engaged in handbilling on behalf of the Union arrested, (D) in causing the Pennsylvania State Police to visit Respondent's above-described facility, (E) in enforcing, through the assistance of the Westmoreland County Sheriff, the injunction it obtained as a result of the above-described civil trespass suit, and (F) in filing and maintaining a motion for an Order to Show Cause and for Civil Contempt against the Union and four-named employees and seeking to enforce by fines and other penalties, the aforementioned injunctions.

On brief, General Counsel argues that under *Fairmont Hotel*, 282 NLRB 139 (1986) where an Employer attempts to restrict picketing, handbilling and related activities on its premises, the Board is required to weigh the relative strengths of the Union's Section 7 rights against Respondent's property rights to determine whether Respondent's conduct violated the Act; that the picket signs and handbills (1) assert the Union's protest of the unfair labor practices committed by Respondent in an effort to subvert the Union's organizing campaign and curtail employee exercise of their rights, and (2) are intertwined with an aspect of the Union's organizing campaign, an activity long recognized to be at the core of Section 7; that the picketing and handbilling were performed in large part by Respondent's own employees or by former employees whose alleged unlawful discharges stand at the very

heart of the unfair labor practices which were the immediate focus of the picketing; that the situs of the picketing and the situs of the dispute in this case are identical; that the intended audience for the unfair labor practice aspect of the picketing and handbilling was the potential customers of the store and the picketing was intended to exert economic pressure on the Respondent by reaching that audience at the store itself; that the manner in which the Union message was communicated did not diminish the strength of its Section 7 right since the picketing was carried out in a manner which was not unduly disruptive of Respondent's business in that the number of pickets was limited and they refrained from obstructing or blocking ingress or egress by customers and any one else and any other misconduct; that the Respondent's property interest in limiting access to the front of its store is relatively weak since (1) the property is open to the public and public access is welcomed and encouraged, and (2) Respondent has permitted public and charitable organizations to solicit in front of the store; that since Respondent has permitted church groups and fraternal organizations to solicit in front of the involved store, it apparently was enforcing its property rights selectively, *Medina Super Duper*, 286 NLRB No. 73 (October 15, 1987); that because the rights asserted by the Union outweigh Respondent's property right to exclude picketing and handbilling from in front of its store, the availability of reasonable alternative means by which the union could have communicated its message is not determinative; that accordingly, Respondent violated the Act by each of the actions it took to prevent or restrain picketing and handbilling activities on its property; that the above-described civil lawsuit was filed and maintained solely on the grounds of trespass and while Respondent may now seek to urge that other concerns such as disruption or harassment were also involved, all of the pleadings filed by Respondent in that case deal solely with the trespass issue; that the

issues involved in that lawsuit were primarily Federal in nature and at least from the time the Union filed its unfair labor practice charge in Case 6-CA-19159 on June 2, the Board's jurisdiction under the Act preempted that of the State court under the principles set forth by the United States Supreme Court in *Sears Roebuck and Company v. Carpenters, et al.*, 436 U.S. 180 (1978); and that since Respondent's suit is preempted by Federal law, it follows that *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), upon which Respondent may seek to rely, is inapplicable to the instant case and thus the filing and maintenance of the suit is properly subject to a finding of violation of section 8 (a) (1) of the Act.

Respondent, on brief, contends that the injunctions were not related solely to acts of trespass by Local 23 but rather, the preliminary injunction bars the blocking of ingress and egress and the threatening or harassing of customers, conduct assertedly documented on this record, and the permanent injunction also bars the blocking ingress and egress while allowing picketers and handbillers at the parking lot entrances; that it is undisputed that Davis initiated State court proceedings prior to the filing of any unfair labor practice charge concerning restrictions on access to its property, which is precisely the situation which existed in *Sears, Roebuck, supra*; that in *Sears, Roebuck*, where the union picketed on the premises of a single free standing store, the Court held at 207 that where the party seeking relief in State court has no right to invoke the Board's jurisdiction, and the party that does have that right fails to do so, the jurisdiction of the State court is proper; that Davis was absolutely privileged to enjoin Local 23's unlawful conduct, *Peddie Buildings, Inc.*, 203 NLRB 265, 272 (1973), cited in *Bill Johnson's Restaurants, supra*; that the Employer's access to the courts is worse than illusory if an employer which has obtained a valid State court injunction commits an unfair labor practice by

seeking to enforce it; that because it is improper under the Act for the General Counsel to enforce an asserted claim of exclusive jurisdiction solely through the threat of an unfair labor practice proceeding, the portions of the Complaints dealing with access to the Employer's property must be dismissed on this ground alone; that notwithstanding the State court injunction, Local 23 consented to restrictions on its activities on Davis' property substantially greater than those which the General Counsel will now contend to be proper; that counsel for Local 23 agreed that only two individuals would be permitted on the employer's property to handbill customers, provided that these individuals conducted themselves properly; that the fact that Local 23's representatives ultimately failed to conduct themselves properly, and thus forfeited access to the parking lot does not alter the fact that Local 23 was and is bound by its agreement with Davis; that under *Jean Country*, 291 NLRB No. 4 (September 27, 1988) it is apparent that Davis' property rights are quite strong since Hempfield is a free-standing structure which does not share the property with any other tenants, and the protest of alleged unfair labor practices is an important Section 7 right; that accordingly, this case turns upon the availability of reasonable alternative means; that General Counsel presented no testimony whatever that picketers and handbillers were in any danger by virtue of their activities at the entrances to the supermarket parking lot; that General Counsel did not (and cannot) produce evidence that Local 23 was burdened or put to additional expense by virtue of the location of the picketing and the handbilling just off the store's property at the entrances to the parking lot; that the record is devoid of evidence that Local 23's efforts were unlawfully hampered by confinement of its picketing and handbilling efforts to the entrances to the parking lot; that under circumstances virtually identical to those found in this case, the Board has found that reasonable alternative means existed for the exercise of Section 7 rights, *L&L Shop Rite*, 285 NLRB 1036

(1987) (picketing and handbilling were restricted to a 'grassy area' and public sidewalk); that as the Board in *L&L Shop Rite* made clear, General Counsel's apparent sole reliance on the lesser number of handbills distributed from the parking lot entrances will not carry the burden of showing no reasonable alternative means; that here picketing and handbilling continued on a daily basis for at least four months and under *L&L Shop Rite*, at 11, this "indicates that the Union itself regarded picketing and handbilling at this location to be worthwhile"; that Local 23 forfeited whatever right it may have had to the property by its flagrant misconduct, which included blocking customer ingress and egress intimidating customers and employees, profane language, threats and obscene gestures and littering; that while it may be argued that Davis denied Local 23 access to its property while granting access to other groups, on this record no such finding can be made since credible testimony exists concerning only one such incident, namely a church raffle conducted over the Memorial Day weekend; that isolated access granted to charitable groups does not compel access for non-employee union organizers, *Central Solano County Hospital Foundation, Inc.*, 255 NLRB 468 (1981); that the sole individual conducting the church raffle was seated behind a card table away from the supermarket door; and that given these quantitative and quantitative distinctions, Davis' denial of access to Local 23 was lawful.

On October 16,1989, Respondent filed a motion to dismiss certain of the alleged violations, pointing out that on June 15, 1989, after the briefs herein were filed, the Board issued its Decision and Order in *Giant Food Stores, Inc.*, 295 NLRB No. 38 (June 15, 1989) wherein it held that an employer's maintenance of a State court lawsuit enjoining picketing after the filing of an unfair labor practice charge by a union is lawful. In its reply, filed October 23, 1989, General Counsel points out that on August 8,1989, a Motion

for Reconsideration of the Board's Decision and Order and a Memorandum in support was filed by General Counsel in *Giant Food, supra*. That motion was still pending. Additionally General Counsel argues that the case is "inconsistent with Board precedent, flawed in its reasoning and should not be applied in the instant case." For the reasons specified below, Respondent's motion is denied.

On February 1, 1990, Respondent filed a motion to dismiss certain of the involved allegations citing *Tecumseh Foodland*, 294 NLRB No. 37 (1989), and asserting that the Board's Decision and Order therein was unavailable to Counsel for Respondent at the time briefs were filed herein. In *Tecumseh* the Board found that Respondent was not required to surrender access to its property without limitation to nonemployee picketers and handbillers whose numbers and location would tend to impede the access of patrons to its store. In its response in opposition to the motion, General Counsel, after renewing its objection to respondent's repeated practice of filing additional argument and other briefing materials without justification or regard for the Board's Rules and Regulations, notes that while the Board Decision and Order in *Tecumseh* may not have been available at the time briefs were filed, it certainly was available well before the filing of Respondent's previous, October 1989, Motion to Dismiss. General Counsel contends that the decision in *Tecumseh* is far from dispositive of the issues in the instant case in Respondent's favor and in many ways supports a finding of violation since in *Tecumseh* the Board found that (1) the message the Union seeks to convey by its picketing and handbilling is directed at a diverse population consisting of Respondent's customers, a group which is not readily identifiable, and that audience could not reasonably be reached by direct personal contact, by telephone or mail, nor could the Union reasonably be required to undertake the burden and expense of a

media campaign in these circumstances, and (2) the detailed information presented on handbills can not adequately be contained on a picket sign alone and thus, in the absence of reasonable effective alternate means of communication, "a proper balancing of the parties rights here would permit the union to distribute its handbills in some manner and some place on Respondent's property." *Tecumseh* slip op. at 6. General Counsel points out that the circumstances cited by the Board in *Tecumseh* are markedly different from those which exist in the instant case in that while in *Tecumseh* the entrance area to the store was narrow and pickets stationed themselves inside the entrance as well as on both sides, herein, by contrast, the area was wide and pickets remained at the sides and outside the immediate entryway. Additionally, General Counsel contends that while the Board in *Tecumseh* placed great emphasis on the fact that there was no evidence that the facility "allowed anyone onto its property other than for the purpose of shopping . . . nor was there evidence of usage of the property by any other group or organization, the property in fact appears to have been protected against all solicitations, herein, by contrast, the record clearly demonstrates that the Respondent routinely allowed public, charitable and fraternal organizations to solicit on its premises, thus demonstrating that, as alleged, Respondent discriminatorily enforced a ban on all Union solicitations while permitting other organizations access for that purpose; that the Union representative in charge of the picketing over the Memorial Day weekend indicated her willingness to accommodate Respondent's interests and when asked by a police representative, as a courtesy, to relocate the pickets she immediately complied; that unlike *Tecumseh* where the Union neither offered nor sought any alternate arrangements which would have allowed it to continue some handbilling presence on the Employer's property, herein the parties did reach a temporary agreement permitting pickets at each

roadway entrance and two female handbillers in the parking lot; that thereafter Respondent continued to seek, and in fact obtained, an injunction totally barring all pickets from Respondent's property and only then informally agreed to allow the two handbillers in the parking lot at its sufferance; that the Union, upon its resumption of handbilling, did abide by this informal arrangement only to have Respondent, after several weeks of peaceful activity, seek and obtain total enforcement of the injunction completely barring all activities on its property; and that herein, unlike *Tecumseh* the parties had developed and the Union was following a handbilling arrangement precisely of the sort which the Board in *Tecumseh* indicates would have met the *Jean Country, supra*, balancing list and sanctioned the handbilling as protected Section 7 activity, only to have Respondent unilaterally void the accommodation by enforcing and maintaining the no trespass injunction. For the reasons specified by General Counsel in the reply, this motion is denied.

Contrary to Respondent's assertion on brief, there is credible testimony by at least two witnesses, Defibaugh and Harshell, that Respondent allows other organizations to solicit its customers on the sidewalk immediately in front of the store. None of Respondent's witnesses deny this. Accordingly, as asserted by General Counsel, Respondent was enforcing its property rights selectively.

Did the Union interfere with customer ingress or egress or with deliveries to the store? Regarding the latter, there is no evidence of such interference on the record. With respect to the former, Toffolo testified that the picketers "were sort of in the way of the doorway. You would have to swing wide, with three or four shopping carts, like a matter of constantly having to move people to get around them." Robert Davis testified that the picketers blocked the front of the store and customers had to squeeze around

them. As noted above, however, I did not find Toffolo or Robert Davis to be credible witnesses. Toffolo's testimony on this point is equivocal. And Robert Davis' testimony that the picketers and handbillers blocked the front of the store and customers had to squeeze around them is not credited. Robert Davis was the only witness to testify that picketers actually blocked the front of the store. Regarding what assertedly happened in front of the store during the picketing, Toffolo at one point testified that a man threatened to get Robert Davis. At another point Toffolo testified that the threat was uttered by a woman. Toffolo's testimony on this point is not credited. As noted above, Toffolo also gave uncorroborated testimony that he heard picketers tell customers not to shop here because this guy is a criminal. Toffolo's testimony on this point also is not credited. Robert Davis was less than candid about a number of matters treated above. Consequently, his uncorroborated assertion that he saw a lot of leaflets on the ground and he picked them up can be given little weight even though it is not refuted. Also, as noted above, I did not find Sandy Reich to be a credible witness. Consequently, her assertion about being called a "bitch" can be given little weight. Even if her testimony was credited on this point, while the alleged utterance was not acceptable conduct, it certainly, in and of itself, was not sufficient to change what otherwise would be described as peaceful picketing and handbilling. In my opinion, it was not demonstrated on this record that the pickets and handbillers acted in an obstructive manner or otherwise conducted themselves in any way but a peaceful manner.[112]

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112. As noted above, the Superior Court of Pennsylvania described the involved conduct as peaceful picketing and distributing handbills at the store, and the Court of Common Pleas of Westmoreland County, Pennsylvania concluded that "[t]he number of pickets and their activities effectively impeded access to the store by customers." Also, as noted above, Davis' May 23 complaint in the trespass action alleges that approximately six individuals holding signs bearing the name of the

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Appendix C

As noted above, Respondent, on brief, concedes that the Union's Section 7 right, at the situs of the dispute, is an important right. Since Respondent is the sole occupant of the property, its property rights are greater than an employer in some type of a shopping center. But Respondent weakened its property rights by allowing other organizations on its property to solicit. With respect to alternative means, the Board in *Sentry Markets, Inc.*, 296 NLRB No. 5 (Aug. 10, 1989) agreed with the Administrative Law Judge therein, in a situation similar to the one at hand regarding alternatives, the handbilling on public property near the entrance to the parking lot is not a reasonable alternative because General Counsel has shown that handbilling at that location was ineffective and unsafe.

In *Sentry Markets, Inc.* the Board concluded:

> Accommodating the private property and Section 7 rights pursuant to our analysis in *Jean Country*, we find that the Respondent's property interest would suffer some impairment if access were granted to the Union. This impairment, however, would not be substantial in light of the unobtrusive manner in which the Union handbilled and the fact that Respondent essentially opened up its premises to the public. By contrast, in the absence of reasonable alternative means of

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Union Defendant entered onto the property of Plaintiff and remained positioned at the main entrance of Plaintiff's Hempfield store. It is not clear exactly what evidence the Court of Common Pleas relied on to reach the above-described conclusion. The credible evidence of record herein does not demonstrate that the picketers and handbillers acted in an obstructive manner.

> communication, the Union's Section 7 right would be "severely impaired — substantially 'destroyed' within the meaning of *Babcock & Wilcox* [351 U.S. 105 (1956)] — " without entry onto the respondent's property. *Jean Country*, above, slip op. at 24. Therefore, under the facts of this case we agree with the judge that the section 7 right outweighed the private property right, and that the Union was entitled to handbill at the storefront sidewalk near Respondent's customer doors.

In my opinion, a similar conclusion should be reached herein, especially when one considers the discrimination, the fact that some of the picketers and handbillers were employees of Respondent, that some of these employees were protesting their own discharges, and that the activity has long been recognized to be at the core of Section 7. Respondent's conduct, namely forcing the handbillers and picketers to leave the sidewalk in front of the store violated Section 8 (a) (1) of the Act.

Did Respondent violate the Act by maintaining a trespass suit, enforcing an injunction, and maintaining a motion to show cause and for civil contempt, and seeking to enforce fines? As noted above, respondent cites the board's decision in *Giant Food Stores, Inc.*, 295 NLRB No. 38 (June 15, 1989) wherein the Board held that an Employer's maintenance of a State court lawsuit enjoining picketing after the filing of an unfair labor practice charge by a Union is lawful.

In *Peddie Buildings*, 203 NLRB 265 at 267 (1973) the Board pointed out that "[t]he Act gives employees the right to picket their own employer at the primary location. This right is embodied in

section 7, and given emphasis in Section 13." Also, therein the Board stated, "[i]n view of the employees' obvious right of access to their employer's premises for work purposes , we believe that Section 7 gave them a parallel right of access for purposes of otherwise legitimate picketing."[113]

Some of the picketers and handbillers who were stationed in front of the Davis Hempfield store on May 23 engaged in protesting unfair labor practices and organizing were employees of Respondent.[114] In filing its above-described May 23 complaint, Respondent alleged that "Defendants continue to persist in their unlawful conduct of trespass."[115]

Nonetheless, even though the employees had a statutory right to legitimately picket in front of Respondent's store and Respondent did not differentiate between them and the non-employee pickets, Respondent's filing of the trespass action, in and of itself was not a violation of the Act. *Clyde Taylor Company,* 127 NLRB 103 (1960).

But maintaining the trespass action the Union filed a charge and a complaint was issued by the Board is another matter. As

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113. The Board pointed out that "[i]n confirming the right of employees to picket their employer in front of his premises, we do not pass on whether outside organizers would have the same right."

114. The Supreme Court has insisted on rules distinguishing between the picketing rights of employees and of non-employees in measuring intrusion on private property. As noted by the Court in *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) "[t]he distinction is one of substance."

115. As noted above, the complaint speaks to and the involved courts treated this strictly as a trespass action.

noted above, the Union pointed out to the Court of Common Pleas before its November 24 decision that the matter was preempted by the Board. Also as noted above, Respondent cites *Giant Food, supra,* for the proposition that the employer's maintenance of a state court lawsuit enjoining picketing after the filing of an unfair labor practice charge by a union is lawful.[116] But the Board did not treat the threshold issue in *Giant Food,* namely, whether the Board's jurisdiction preempts the Respondent's suit. *American Pacific Concrete Pipe,* 292 NLRB No. 133 (February 21, 1989). Also, *Giant Food* did not involve discrimination in the selective enforcement of property rights, unlawfully discharged employees participating by protesting unfair labor practices or numerous unfair labor practices against employees.

In *San Diego Unions v. Garmon,* 359 U.S. 236 (1959) the Court stated at 244:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether States have acted through laws of

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116. Respondent's trespass action was filed long before the Board decided *Giant Food* and, therefore, Respondent could not have been relying on *Giant Food.*

> broad general application rather than laws specifically directed toward the governance of industrial relations. [footnote omitted] Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

And at 245 the Court states:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

The Board's regulation of Section 7 protected activity is not limited to a finding of a violation. In *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971) the Court, at 144 concluded that at the Board's request, a Federal District Court may enjoin the enforcement of a state-court injunction against organizational picketing and handbilling "where [, as in the case, the Board's] federal power pre-empts the field." Compare *Capitol Service, Inc. v. Labor Board* 347 U.S. 501 (1954).

As pointed out in *Garner v. Teamsters Union*, 346 U.S. 485, 488 (1953),

> This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it

> is ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union v. Wisconsin Board,* 336 U.S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditional local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local v. Wisconsin Board,* 315 U.S. 740, 749. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state . . . authority. Nor is there any suggestion that . . . [the] plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the Federal Board would decline to exercise its powers once its jurisdiction was invoked.

The Court in *Garner* went on to conclude, at 500 and 501 that

> when the federal power constitutionally is exerted for the protection of the public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure . . . .

The Court in *Sears, Roebuck, supra,* at 204 points out that it has held that state jurisdiction to enforce its laws prohibiting violence, defamation, the intentional infliction of emotional

distress, or obstruction of access to property is not pre-empted by the Act. As noted above, the Court of Common Pleas of Westmoreland County in its November 24 Decision concluded "[t]he number of pickets and their activities effectively impeded access to the store by customers." The court did not specifically speak to Toffolo's assertion about a threat by a picket to get Robert Davis (violence?), or Toffolo's assertion that pickets said "this guy is a criminal" (defamation?), or Reich's assertion that one of the pickets said "[g]et out of here bitch," which scared her half to death (infliction of emotional distress?). Either the court did not have these assertions before it for consideration or it did not believe that it was necessary to cover them in its Decision or it did not rely on them. As noted above, I am not relying on them.[117] Moreover, in my opinion, what happened here on May 23 cannot be found to be an obstruction of access to property. Consequently, pre-emption was not precluded.

The controversy presented to the State court is the same controversy that was presented to the Board on this point. Therefore, Davis' suit is pre-empted by Federal law. *Nash-Finch Co.* and *Capitol Service, Inc.*

Since Davis' suit is preempted by Federal law, it appears that *Bill Johnson's Restaurants* does not apply to the instant case in that the Court therein, at footnote 5, stated that the principals enunciated therein would not apply "with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law pre-emption. . . ."

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117. One must wonder if these assertions, which were not even mentioned in the Decision of the Court of Common Pleas, were nothing more than a belated attempted manipulation to have the aforementioned language in *Sears, Roebuck*, a case which the Court of Common Pleas cited in its Decision, apply to the situation at hand.

Appendix C

Where a retaliatory State court suit is pre-empted by the Act or other Federal law, the principals set forth in *Bill Johnsons' Restaurants* do not apply. As indicated in *Nash-Finch Co.* and *Capitol Service, Inc.*, the Board can enjoin the prosecution of such lawsuits without inquiry into the reasonableness of their legal or factual basis.

Respondent had a retaliatory motive in maintaining the involved state suit. As noted above, Defibaugh and Harshell testified that during the picketing in November when one group was leaving for the day and another group was coming in and there was, therefore, six people there at the time, someone from the store would come out and take pictures. None of the Respondent's witnesses denied this. And as noted above, I find Defibaugh and Harshell to be credible witnesses. This testimony is credited.

As set forth above, Davis, in its November 25 motion to show cause alleged, among other things, that individual employees and the Union disregarded the provision of the injunction by exceeding the number of pickets (three) permitted to each entrance to the Davis property. If Davis was using photographs Defibaugh and Harshell testified about, as covered in the next preceding paragraph, than it was fabricating evidence. If it did not use the photographs for this purpose, than it was not made clear on this record why Respondent would make a point of taking such photographs. Regarding another allegation in Davis' November 25 motion for a Rule to Show Cause, it is noted that while Davis alleges that Defendants violated the court's order by parking their cars on Plaintiff's property, nowhere in its order did the court specifically speak to such a practice let alone specifically prohibit it. And finally, regarding Davis' allegation that the individually named employees should be held in contempt for distributing handbills at the door of Davis' facility, as noted above, the law treats employees and nonemployees differently, and the Union's

response to the motion seemingly points out that Davis' counsel and its representatives were aware of this. Nonetheless, Davis, in its motion, prayed that the court should enter an order directing Defendants, including the above-named individual employees, to show cause why they should not be fined an amount equal to the cost of Plaintiff's losses incurred as a result of Defendant's failure to comply with the order of the court.

The picketing and handbilling which occurred on May 23 was, as described by the Superior Court of Pennsylvania, was peaceful. There was no reason for Respondent to file the lawsuit other than to limit or eliminate the effectiveness of the handbilling and picketing, some of which was done by its own employees, which employees, as found above, were previously unlawfully discharged by Respondent. Respondent had engaged in numerous unfair labor practices and this was another part of its bad faith scheme to defeat Union organization. By maintaining the trespass suit Davis violated the Act.[118] This covers all aspects of the suit, including enforcing the injunction and moving for a finding of civil contempt.

Additionally, Davis, through its supervisors and/or agents, by threatening to have persons engaged in handbilling and picketing arrested and causing the Pennsylvania State Police to visit Davis' Hempfield store, violated the Act. *Peddie Buildings, supra.*

The amended complaint in Case 6-CA-19388 alleges that from on or about May 31, to on or about June 14, a majority of the

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118. It is not necessary to specifically find whether the violation occurred after the union filed a charge or the Board issued the complaint. As noted in *Sears, Roebuck, supra,* there is a difference of opinion on when the Board's jurisdiction pre-empts. But there should be no question but that when the involved complaint was issued State jurisdiction was pre-empted.

above-described Unit designated and selected Local 23 as their representative for purposes of collective bargaining; that at all times since on or about May 31, Local 23 by virtue of Section 9 (a) of the act, has been, and is, the exclusive representative of the Unit; that on or about May 13, Local 23 requested Respondent to recognize it as the exclusive collective bargaining representative of the employer in the Unit and to bargain with it as the exclusive collective bargaining representative of the employees in the Unit; that since on or about May 31, Respondent has failed and refused, to recognize or bargain with the Union as the exclusive collective-bargaining representative of the Unit; and that the involved unfair labor practices are so serious and substantial in character that the possibility of erasing the effects of the unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards would, on balance, be protected better by the issuance of a bargaining order than by traditional remedies alone.

The parties stipulated that the employees listed on the first three pages of Joint Exhibit 14, attached hereto as Appendix B, are in the Unit subject to starting and ending dates. The list contains 107 names, including Miscovich. Page 3 of Joint Exhibit 14 also includes the nine employees who were unlawfully terminated, as described above. Miscovich is also included in this list.[119] Consequently, there is no dispute regarding 106 employees, subject to starting and ending dates, and, in view of my conclusions regarding the 9 unlawful terminations, there are 115 employees in the unit. On brief, the parties agree that six individuals on the list

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119. Defibaugh, Garris, Good, Hilty, Shotts, Welsh, Miller, Miscovich, and Kunkle. As noted above, in my opinion Defibaugh was not a supervisor.

should be excluded by virtue of their starting and ending dates.[120] The parties submitted separate lists in their briefs and to some extent they are not the same. More specifically, while they agree on six individuals and while General Counsel agrees that Jerry Marshell, who worked to May 11, should be excluded, no reason is given for not excluding Alfred Petril, who also worked to May 11. Respondent is correct; Petril should be excluded. Although Cathy Christner and Melaine Vallozzi were employed at Respondent's Hempfield store on May 13, they were not employed at the store on May 31 and, therefore, they will be excluded.[121] Accordingly, a total of 97 employees were in the involved Unit pursuant to this stipulation. And adding the 9 unlawfully terminated employes makes it 106.

Twenty seven of the disputed employees, see the addendum to Joint Exhibit 14 attached hereto as Appendix B, also work at Respondent's Greensburg store. On brief, General Counsel argues that regarding at least nine of these individuals, virtually no basis at all exists in the record to support Respondent's contention that they should be included. More specifically, General Counsel argues that Cathy Donahue never worked at the Hempfield store and two witnesses testified herein that she was the manager of the deli department at the Greensburg store during the time in question; that Patrick Fetter only worked at Greensburg one week in June and several weeks in August; that Donald Miller only worked at Hempfield during one 8-hour period in May; that Robin Myers, Augie Plevelich and Carol Pyle worked exclusively at Greensburg with the exception of a few weeks in May when they spent time at Hempfield; that the record does not show that Sandra Wilkenson

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120. Mark Alcorn, Marty Fox, Michelle Kallock, Brian Kirkendall, Jerry Marshell and V. Piccar.

121. One of the two signed a UFCW authorization card.

and Lisa Warrick worked at the Hempfield store; that George Struhala only worked at the Hempfield store sporadically; and that none of the nine worked for any significant period or at any regular or permanent basis at Hempfield. With respect to Wilbur Albright, General Counsel argues that he, along with James Blaser, performs singular functions for Respondent which are unrelated to any bargaining Unit activity; that he shares virtually no community of interest with any Unit employees, his work duties, namely repair and maintenance tasks, are distinct from Unit employees as is his scheduling, method of payment, and authority; and that the majority of his time is spent at the Greensburg store although he punches no time clock at either location. Regarding Blaser, General Counsel contends that this trouble shooter for Respondent, who sets his own schedule, does not punch a time clock and is paid an hourly wage with no other benefits, has little contact with Unit employees and shares virtually no community of interest with them. Also, General Counsel points out that the majority of Blaser's hours are spent at Greensburg.

Regarding Stanley White, General Counsel argues that although he is more regularly employed, he also lacks any contact or community of interest with the Hempfield employees; that White's only contact with the Hempfield store occurs during that portion of his work day when he delivers and unloads a portion of his load to that store and during these periods he rarely, if ever, has contact with any other employees but works solely on his own; that White is a member of the Steelworkers and is governed by the terms and conditions of the collective bargaining agreement between that Union and Respondent; that White's job and duties are totally distinct and different from that of any Hempfield employee and he is supervised solely by the produce manager at the Greensburg store; and that White's contact with Hempfield is so limited that there is no basis for even applying a dual function analysis to him.

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With respect to Neil Vario and John Shumaker, General Counsel contends that after having worked exclusively at the Greensburg store for a number of years, in late April 1986, they were transferred to the Hempfield store and worked there exclusively; that in the case of Vario, this assignment lasted for a period of approximately 4 months and in Shumaker's case for over 1 year; that both men were told at the time of their transfer and repeatedly thereafter, that these moves were only temporary and they would be returned to the Greensburg facility as soon as possible; and that in both cases this took place and they have since returned to working exclusively at Greensburg, and both remained members of the Steelworkers at Greensburg during the time they were assigned to Hempfield.

General Counsel points out that Janet Barbour, who spent time at both of Respondent's facilities, was also told that her assignment was temporary and she too would ultimately be returned to work exclusively at Greensburg; and that she too was a member of the Steelworkers Unit at the Greensburg during the time she worked at Hempfield.

It is contended by General Counsel that the other Greensburg employees who worked at Hempfield did not share a sufficient community of interest with the Hempfield Unit to be included on that basis; that most of these employees spent the great majority of their time at Greensburg and in many cases did not even punch a time clock at Hempfield when they worked there; that most were assigned to Hempfield on an irregular basis, either to fill in for absent employees or on an ad hoc basis with no advance scheduling or are assigned to Hempfield as needed to assist and train new employees; that in most cases these Greensburg employees are primarily supervised by management officials at the Greensburg store and do not report or take directions from any Hempfield

supervisor; that all of these employees, except Vicki Cramer, Patti Hutton, Kim Reich Gallentine and Stacy Wano are members of the Steelworkers[122]; and that in these circumstances, the Board has found that a collective bargaining agreement bars dual function employees who are included in the unit from inclusion in any other bargaining unit sought by the petitioning union, *Otasco, Inc.*, 278 NLRB 376 (1986).

Respondent, on brief, contends that dual function employees, that is employees who do bargaining unit work and also non-bargaining unit work for the same employer, need not spend 50 percent or more of their time doing bargaining unit work; that under *Fleming Industries, Inc.*, 282 NLRB 1030 (1987) certain of the dual function employees should not be excluded from the unit solely because they are represented by the Steelworkers; that regarding the employees who are not in the Steelworkers, Albright, at least with respect to the less specialized maintenance tasks, he performed the same duties as other Hempfield unit employees; that Kim Reich Gallantine, around February 1986 began working about 12 hours a week at the Hempfield store as a grocery price coordinator and she reported to Hempfield store manager Mowery; that Patti Hutton was assigned to work at Hempfield prior to the store's opening and she worked as a grocery price coordinator at Hempfield, working 8 to 16 hours a week and reporting to Mowery while in Hempfield; that Vicki Cramer Smartnick in late 1984 or early 1985 was assigned to work at the Hempfield store where she worked three days a week, four to five hours a day, and she reported to Mowery and Elda; and that Stacy Wano Woodmancy was assigned to work at the Hempfield store prior to the store's opening and she continues to work at the Hempfield store three days a week

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122. Albright and Blaser, who are treated above, are the only other Greensburg employees who are not members of the Steelworkers.

for a total of about 12 hours, reporting to Mowery and Elda.

For the reasons specified by General Counsel on brief, as summarized above, none of the employees who are also employed at the Greensburg store, which employees are listed on the last page of Appendix B hereto, should be included in the involved Unit.

Regarding the five disputed college students set forth in Appendix B hereto, General Counsel, on brief, contends that the evidence of record indicates that these five individuals worked virtually exclusively during the spring and summer months traditionally associated with the college vacation period and/or for a limited period during the end of the year holidays; that this pattern persisted in both1985 and 1986, after which none of these individuals continued to be employed with Respondent; that the Board has held that students who work only during the vacation periods are excluded from the Unit, *Century Moving & Storage, Inc.*, 251 NLRB 671, 681 (1980), *Berinson Liquor Mart*, 223 NLRB 1115 (1979); that accordingly none of the five college students are eligible for inclusion in the involved Unit. Respondent, on brief, contends that the test for inclusion in the Unit is whether the circumstances of their employment give them a community of interest with the other employees with respect to wages, hours and working conditions, *Gruber's Star Market, Inc.*, 201 NLRB 612, 613 (1973); and that the five college students did share a community of interest in that each of the five worked for two or more summers and two of the five returned to employment following the summer of 1986.

The case Respondent cites deals with high school students who worked a substantial number of hours weekly. There the

contention was that they work as stockboys and 'come and go all of the time,' and leave Respondent's employ after graduation. Here, the contention is that the involved students work during vacations and do not regularly work on a part time basis during the remainder of the year. Since this is the case herein, under the cases cited by General Counsel these college students are excluded from the unit.

With respect to the students enrolled in high school cooperative employment programs, General Counsel, on brief, argues that the unit determination in the aforementioned Decision and Direction of Election specifically excludes "students employed pursuant to cooperative education programs"; that as indicated in Appendix B, five such students were employed in 1986; that since the last two named on the list apparently did not continue their employment beyond the period of the program, it appears to be undisputed that they should be excluded; that while the program ended June 10, three of these individuals continued to be employed for substantial periods thereafter [123]; that there is no evidence that the three were converted into regular employees; and that if it is deemed appropriate to include them in the bargaining unit, such inclusion cannot have taken place earlier than June 10. Respondent, on brief, contends that the three should be included in the Unit after June 10. I agree.

Regarding the seven employees listed in Appendix B hereto under "OTHERS IN DISPUTE," General Counsel contends that Thomas Howard's terms and conditions of employment in addition to containing elements of supervisory and/or managerial status are so different from those of other bargaining unit employees, that he lacks any significant community of interest with employees in the

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123. Jamie Boice, Valarie Kollar and John Kula. Kula signed a UFCW authorization card on May 5.

bargaining unit and, therefore, he should be excluded; that Thomas is a salaried employee unlike all those in the bargaining unit, does not punch a timecard, and has the discretion to set his own schedule within the limits established by the needs of his job; that Howard has complete control over the ordering of frozen food, consults with Mowery and James Davis concerning advertising and the ordering and display of products, requests assistance from Mowery and directs the assistant; and that his position is a unique one which casts him in a quasi-managerial and supervisory position aligned with management and lacking any significant community of interest with the employees in the bargaining Unit. Respondent, on brief, contends that Howard at no time acted as a supervisor within the meaning of Section 2(11) of the Act; that Howard did not have the authority to assign or transfer employees, hire, suspend or discipline, lay off or recall, or promote employees; and that Howard exercised far less discretion and authority than Defibaugh, whom General Counsel seeks to include in the Unit.

Contrary to Respondent's assertions, just because Defibaugh has been included in theUnit does not mean that Howard must be included. Among other things, Defibaugh was paid an hourly wage. She punched a time clock. She did not consult with Mowery and Jim Davis about advertising. There is a great deal of difference in the two positions. In my opinion, General Counsel is correct, namely, Howard's terms and conditions of employment in addition to containing elements of supervisory and or managerial status are so different from those of any other bargaining Unit employee that he lacks any significant community of interest with employees in the bargaining unit and, therefore, should be excluded.

Anthony Ianni, who works as a bagger and stock boy at Respondent's Hempfield facility, quit during the week ending

April 19. On July 16 Ianni filled out an application for employment with Respondent, General Counsel's Exhibit 77. On brief, General Counsel contends that the uncontroverted facts demonstrate that during the critical period under consideration herein, when the Union achieved majority status, Ianni simply was not an employee of Respondent, and thus must be excluded from consideration as a member of the bargaining unit. I agree.

Terry Jackson was employed continuously as a bagger at the Hempfield store throughout the period involved and no reason is given for excluding him from the Unit. Accordingly, he will be included in the involved Unit.

Laura Marchetti apparently left Respondent's employment during the week ending March 8 since there is no evidence that she was employed by Respondent beyond that date. Accordingly, she will not be included in the Unit.

With respect to Brian Mull, General Counsel, on brief, contends that since Mull only worked 4 hours on each of two weekends in May and thereafter did not work again for Respondent until July of that year when he began employment on a part-time basis, during the critical period herein he was not eligible or available for employment and thus should not be included in the Unit. Respondent, on brief, contends that it is fundamental Board law that laid off employees who have a reasonable expectation of reemployment in the foreseeable future are to be included in the Unit, *The Marley Co.* 131 NLRB 866 (1961); that factors to be considered include the circumstances of the layoff and the content of the communication to the employee at the time of the layoff, *Sol-Jack Co.*, 286 NLRB No. 113 (November 27, 1987); and that applying these principles to this case, it is plain that Mull must be included in the Unit. Since Mull had a reasonable expectancy of

employment within the foreseeable or near future, he will be included in the Unit.

Tim Sheridan worked as a bagger at Respondent's Hempfield store. Respondent's exhibit 16 shows that he worked part time for three weeks in January, one week in March and from the end of May to the end of August. On brief, General Cousel argues that Sheridan was enrolled as a student and unavailable for work, other than during school breaks; and that, accordingly, Sheridan should be excluded from the Unit, *Century Moving & Storage, Inc., supra.* Respondent, on brief, contends that because General Counsel has shown no reason to exclude Sheridan, he should be included in the Unit. Sheridan's employment history with the Respondent corresponds to the college students treated above. Students who only work during vacation periods are excluded from the unit. This appears to apply to Sheridan. Consequently, he will be excluded.

On brief, General Counsel argues that Dick Shebilsky was a supervisory employee in the meat department; that he, unlike bargaining unit employees did not punch a time clock and like admitted supervisor Toffolo was responsible for ordering meat and other products for the meat department; that he had the authority to direct employees in their work, interview prospective employees and to effectively recommend the hire of new employees; and that apparently Shebilsky was a supervisory person and thus ineligible for inclusion in the Unit. Respondent does not treat the status of Shebilsky on brief. Shebilsky's terms and conditions of employment appear to be those of a supervisor or manager. Clearly they are different from those of the employees in the bargaining Unit. Shebilsky does not enjoy a community of interest with the employees in the bargaining Unit. He must be excluded.

With the addition of Jackson and Mull, there were 108 in the

Unit until July 10 and then with the addition of the three students who formerly were in the cooperative program there were 111 employees in the Unit.

General Counsel introduced 60 UFCW authorization cards. Kula was a cooperative program student when he signed his card on May 5. Also, Vallozzi signed her card on May 5. As noted above, Kula is not included in the Unit until July 10 when the aforementioned program ended. Also, as noted above, Vallozzi has been excluded because she left Respondent's employ on May 16.

Regarding Hilty's card, General Counsel, on brief, argues that notwithstanding the fact that her card only has the month and the year, Hilty testified that she signed the card in April, shortly before she was discharged on April 19; that this was well in advance of the UFCW's demand and the critical time period; and that the Board has held that such a discrepancy does not destroy the card's validity where testimony supports the conclusion that it was signed and timely dated, *Burger King*, 258 NLRB 1293 (1981) and *J.P. Stevens and Company, Inc.*, 247 NLRB 420 (1980). Respondent, on brief, contends that although Hilty testified that she signed the card in early April, there is no way for General Counsel to prove the card was signed before Hilty was terminated. As noted above, it is concluded herein that she was unlawfully terminated. Hilty's uncontroverted testimony that she signed the card in early April is credited. Since this was before the demand date, I find Hilty's card to be valid.

General Counsel, on brief, argues, with respect to Rubin Weery's card, that he testified on direct examination that he read the card before signing it, he was not coerced to sign it and he was never told that the sole purspose of the card was to obtain an election; that on cross-examination, after being confronted with a

statement he gave the Respondent, Weery testified that notwithstanding the statement, when he signed the card nothing was said other than if he wanted the Union, he should go ahead and sign the card; that the statement was given in a coercive climate and cannot be credited over Weery's present recollection; that the petition Weery signed in July seeking to revoke his card is ineffective since such attempted revocation took place long after (a) the Union's demand for recognition, (b) when the Union had obtained a majority, and (c) Respondent began its unfair labor practices; and that in these circumstances, any revocation is ineffective to undercut the validity of the card, *Photo Drive Up* 267 NLRB 329, 364 (1983) and *Warehouse Groceries Management, Inc.*, 254 NLRB 252, 254 (1981). Respondent, on brief, contends that Werry testified that the solicitor and alleged discriminatee Larry Miller threatened that he would be "out of a job" if he did not sign the card; and that this type of Union coercion plainly invalidates Werry's card, *NLRB v. Sanford Home for Adults,* 669 F.2d 35 (2d Cir. 1981). Ultimately, Werry testified that when the card was given to him by Miller he said nothing other than if you want the Union, than go ahead and sign the card. Since it was not demonstrated that Werry was coerced when he signed the card, it will be counted. In view of Respondent's campaign of coercive unlawful activity, there was no effective revocation of this card.

Regarding Wendy Sarsfield's card, General Counsel argues that when she was confronted on cross-examination by a statement purporting to reflect an interview with Respondent's attorney in January 1987, Sarsfield testified that she had been given no choice about meeting with the attorney and she felt coerced at the time of the meeting, had refused to sign the statement and refused during her testimony to adopt any portion of it which would have been relevant to the issue of the authenticity or validity of her Union card. Respondent, on brief, contends that Sarfield testified that the

individual who solicited her card misrepresented to her that the sole purpose was to obtain an election; and that such a misrepresentation renders Sarsfield's card invalid, *W&W Tool & Die Mfg. Co.*, 225 NLRB 1000 (1976). Sarsfield testified herein that she was not told when she signed the card that the card was only for the purpose of obtaining an election. When she signed the card she was not relying on what she later heard from employees in the store. In the circumstances, her card will be counted.

With respect to those employees who signed a UFCW authorization card and also a Steelworkers authorization card, General Counsel argues, on brief, that such Steelworker cards were never introduced herein; that the record amply demonstrates that Respondent was embarked on a coercive and unlawful campaign to subvert the organizing efforts of Local 23 by soliciting support and signatures for the Steelworkers; and that in these circumstances the references appearing in the record to employees signing Steelworker cards can form no basis for undercutting the validity of the cards signed on behalf of Local 23. Respondent, on brief, contends that in the absence of a revocation of either card, it is well-settled that both cards are invalid because neither unambiguously shows the individual's choice of union representation, if any, *Windsor Place Corp.*, 276 NLRB 445, 449 (1985) and *Crest Containers Corp.*, 223 NLRB 739 (1976). Respondent limited its contentions to Shotts, arguing that she testified that she signed a Steelworker's authorization card about one month after she signed a UFCW authorization card. In support of this assertion, Respondent cites page 177 of the transcript herein. Contrary to the assertion of Respondent, the transcript cite refers not to the testimony of Shotts but rather to the testimony of Kula. As noted above, he is not included in the Unit until July 10 when the cooperative program ended. Consequently, his UFCW authorization card, dated May 5, will not be counted in

determining whether the Union had a majority when it demanded recognition on May 13. It does not appear that Shotts ever signed a Steelworkers autho ization card. Regarding the other employees who signed Steelworker authorization cards, it is noted that a number of them signed letters revoking such authorizations, Charging Party Exhibits 1 through 5. Moreover, in view of the coercive unlawful campaign waged by Respondent, any authorizations signed for the Steelworkers will be given no consideration herein.

As noted above, the cards of Jennifer Thomas, John Rusnica and Tammy Traister were placed in evidence with uncontroverted examples of their handwriting for comparison purposes. An examination of these documents demonstrates that in all three instances the UFCW authorization cards are authentic.

The conflicting testimony of Porter and Kaskie about which portions of his card Paul Williams filled out in their presence is not sufficient to invalidate the card; it will be counted in determining whether the Union had a majority.

As concluded above, there were 108 in the Unit, including Jackson and Mull. And after July 10 the three students who up to that point were in the cooperative program should be added. In view of the fact that John Hart did not start at Respondent's Hempfield store until May 19, there were 107 in the Unit on May 13 when Local 23 made its demand for recognition with 55 authorization cards.[124] Consequently, the Union had a majority on

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124. As noted above, I am not counting Vallozzi's card for while she signed it on May 5, she left Respondent's employment on May 16. Also, Kula's card, signed May 5, is not counted for May 13 because he was not technically in the Unit until July 10. And finally, since 3 of the 60 cards introduced by General Counsel are dated after May 13, they will not be counted in determining the total on May 13. With these 3, the Union had 58 cards as of May 24.

May 13. And that majority continued well beyond the end of May.

General Counsel, on brief, argues that a bargaining order is the appropriate remedy in this case since the Union achieved the support of a majority of the employees in the bargaining Unit based on authorization cards; that Respondent engaged in a clear course of conduct calculated to undermine and destroy support for the Union among employees commencing in April when it first learned of the Union's organizing campaign; that the unlawful conduct included interrogation, threats of reprisals, and threats of plant closure, long recognized as a hallmark violation sufficient to support the issuance of a remedial bargaining order; that Robert Davis, Respondent's Board Chairman and owner engaged in substantial efforts to undermine Local 23 by assisting the Steelworkers in soliciting support among the employees at Hempfield and compounding this violation by overtly coercing employees to obtain their support for that labor organization; that Respondent committed egregious and repeated violations of Section 8 (a) (3) of the Act by the summary discharges of nine Union supporters and card signers; that there really is no room for speculation that the passage of time would insure a fair election; that the effect of such severe misconduct is persistent and ongoing; and that a bargaining order is the only appropriate remedy in this case. Respondent, on brief, contends that since Local 23 never represented a majority of the involved employees, no bargaining order may issue.

The Supreme Court in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969) affirmed the Board's authority to issue a bargaining order where a union majority is established by cards and the nature and the extent of the employer's unfair labor practices render unlikely a free choice by the employees in a Board election.

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Respondent commenced its course of unfair labor practices immediately upon learning of the Union campaign. The unfair labor practices were committed by a number of Respondent's admitted supervisors including its president and its chairman of the board. Respondent's actions were directed at numerous of its employees, some of whom are high school students. Respondent unlawfully interrogated, created the impression of surveillance, solicited employee complaints and grievances, threatened to close the store, coerced its employees to join the Steelworkers, changed terms and conditions of employment, changed a work schedule to force a constructive discharge, threatened reprisals, and discharged a number of employees. The effect of this conduct was to instill a strong fear of union representation. Simply requiring Respondent to refrain from repeating such conduct will not erase the effect of this fear of union representation and will not enable the employees to participate in a free and uncoerced election. In my opinion, a mere cease-and-desist order would not deter the recurrence of unfair labor practices which were committed by its top management officials who are still in charge of the Company. In view of the degree and pervasiveness of the unfair labor practices, the holding of a fair election is no longer possible. Respondent, by its conduct, has forfeited the right to an election. A bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and otherwise to remedy the violations committed.

By refusing to recognize and bargain with the Union, as requested and instead engaging in the course of unlawful conduct which undermined the Union's majority status and prevented the holding of a fair election, Respondent violated Section 8 (a) (5) of the Act. *Trading Port, Inc.*, 219 NLRB 298 (1975). Its bargaining obligation arose on May 13, 1986, the date of the Union's demand

inasmuch as the Union by then had achieved majority status and Respondent commenced its clear course of unlawful conduct even before that date. It is obvious that Respondent intended by its unlawful conduct to dissipate the Union's majority status. In view of the nature of Respondent's unfair labor practices, it is my opinion that Respondent also violated Section 8 (a) (5) of the Act by refusing to recognize and bargain with the Union as the representative of the majority of its employees while simultaneously engaging in unlawful conduct in an attempt to undermine the Union's majority status and prevent the holding of a fair election.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Charging Party and the Steelworkers are labor organizations within the meaning of Section 2 (5) of the Act.

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8 (a) (1) of the Act:

(a) Interrogating an employee regarding the employee's union membership, activities and sympathies and the union membership, activities and sympathies of fellow employees.

(b) Creating an impression among its employees that their union activities were under surveillance by Respondent.

(c) Soliciting employee complaints and grievances

thereby promising its employees increased benefits and improved terms and conditions of employment.

(d) Threatening employees with store closure if they selected the Union as their collective bargaining representative.

(e) Threatening employees with unspecified reprisals if they supported the Union.

(f) Threatening employees that their union organizational activity was futile.

(g) Threatening employees by accusing them of disloyalty for supporting the Union.

(h) Making verbal announcements and, through the assistance of the Pennsylvania State Police, discriminatorily refusing to permit the Union to picket and handbill on Respondent's Hempfield Township, Pennsylvania property while permitting other organizations access to its property for purposes of soliciting its customers and related activities.

(i) Maintaining a civil trespass suit against the Union in the Court of Common Pleas of Westmoreland County, Pennsylvania, which enjoins the Union from picketing on Respondent's Hempfield Township premises.

(j) Threatening to have persons engaged in handbilling on behalf of the Union arrested.

(k) Causing the Pennsylvania State Police to visit Respondent's above-described facility.

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(l) Enforcing, through the assistance of the Westmoreland County Sheriff, the injunction it obtained as a result of the above-described civil trespass suit.

(m) Filing and maintaining a motion for an Order to Show Cause and for Civil Contempt against the Union and four-named employees and seeking to enforce by fines and other penalties, the aforementioned injunction.

4. By urging its employees to join the United Steelworkers of America, AFL-CIO-CLC and by permitting the Steelworkers to utilize Respondent's facility, thereby rendered aid and assistance to the Steelworkers, Respondent committed an unfair labor practice contrary to the provisions of Section 8 (a) (2) of the Act.

5. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of section 8 (a) (1) and (3) of the Act:

(a) Changing the work schedule of employee Charles Miscovich thereby causing his termination.

(b) Imposing onerous terms and conditions of employment upon employee Linda Kunkle thereby causing her termination.

(c) Laying off six named employees and refusing to recall said employees.

(d) Discharging employee Larry Miller and refusing to recall him.

6. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act;

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All full-time and regular part-time employees employed by Davis Supermarkets, Inc. at its Hempfield Township, Pennsylvania, location, excluding confidential employees, students employed pursant to cooperative education programs and guards, professional employees and supervisors and defined in the Act.

7. Since on or about May 13, 1986, and at all material times thereafter, the Union represented a majority of the employees in the above appropriate unit, and has been the exclusive representative of all said employees for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act; and the Respondent was on that date, and has been since, legally obligated to recognize and bargain with the Union as such.

8. By refusing to recognize and bargain collectively with the Union in regard to employees in said appropriate unit on or about and since May 13, 1986, Respondent has committed unfair labor practices prohibited by Section 8 (a) (5) of the Act.

9. The above-described labor practices affect commerce within the contemplation of Section 2 (6) and (7) of the Act.

10. Respondent has not committed any other unfair labor practices alleged in the complaint.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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Respondent will be directed to offer Deborah Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlene Shotts, Sonja Welsh, Larry Miller, Charles Miscovich and Linda Kunkle reinstatement to their former positions and to make them whole for any loss of earning they may have suffered by reason of the above-described unlawful actions by making payments to them of a sum of money equal to that which they normally would have earned had Respondent not engaged in the above-described unlawful action, with backpay and with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 1987[125] Respondent will be directed (a) to preserve and make available to the Board, upon request, all payroll records and reports, and all other records necessary and useful to determine the amount of backpay due in compliance with this Decision and Order, and (b) to expunge from the personnel files of Deborah Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlene Shotts, Sonja Welsh, Larry Miller, Charles Miscovich and Linda Kunkle all documents related to those of Respondent's actions which were determined above to be unlawful labor practices.

In view of the degree and pervasiveness of the unfair labor practices, a broad cease and desist order shall be recommended precluding Respondent from "in any manner" interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, and pursuant to

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125. Under New Horizons, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

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Section 10 (c) of the Act, I hereby issue the following recommended:[126]

ORDER

The Respondent, Davis Supermarkets, Inc., of Greensburg, Pennsylvania, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interrogating an employee regarding the employee's union membership, activities and sympathies and the union membership, activities and sympathies of fellow employees.

(b) Creating an impression among its employees that their union activities were under surveillance by Respondent.

(c) Soliciting employee complaints and grievances thereby promising its employees increased benefits and improved terms and conditions of employment.

(d) Threatening employees with store closure if they selected the Union as their collective bargaining representative.

(e) Threatening employees with unspecified reprisals if they supported the Union.

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126. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(f) Threatening employees that their union organizational activity was futile.

(g) Threatening employees by accusing them of disloyalty for supporting the Union.

(h) Making verbal announcements and, through the assistance of the Pennsylvania State Police, discriminatorily refusing to permit the Union to picket and handbill on Respondent's Hempfield Township, Pennsylvania property while permitting other organizations access to its property for purposes of soliciting its customers and related activities.

(i) Maintaining a civil trespass suit against the Union in the Court of Common Please of Westmoreland County, Pennsylvania, which enjoins the Union from picketing on Respondent's Hempfield Township premises.

(j) Threatening to have persons engaged in handbilling on behalf of the Union arrested.

(k) Causing the Pennsylvania State Police to visit Respondent's above-described facility.

(l) Enforcing, through the assistance of the Westmoreland County Sheriff, the injunction it obtained as a result of the above-described civil trespass suit.

(m) Filing and maintaining a motion for an Order to Show Cause and for Civil Contempt against the Union and four-named employees and seeking to enforce by fines and other penalties, the aforementioned injunction.

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(n) Urging its employees to join the United Steelworkers of America, AFL-CIO-CLC and permitting the Steelworkers to utilize Respondent's facility, thereby rendering aid and assistance to the Steelworkers.

(o) Changing the work schedule of employee Charles Miscovich thereby causing his termination.

(p) Imposing onerous terms and conditions of employment upon employee Linda Kunkle thereby causing her termination.

(q) Laying off six named employees and refusing to recall said employees.

(r) Discharging employee Larry Miller and refusing to recall him.

(s) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Deborah Defibaugh, Charles Garris, Lance Good, Jennifer Hilty, Sharlane Shotts, Sonja Welsh, Larry Miller, Charles Miscovich and Linda Kunkle immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges and make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them with backpay and interest thereon to be computed in the manner set forth above.

(b) Remove and expunge from the personnel files of Deborah Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlene Shotts, Sonja Welsh, Larry Miller, Charles Miscovich and Linda Kunkle all documents which relate to Respondent's actions which have been found to be unfair labor practices, and make whatever record changes are necessary to negate the effect of these documents and Respondent's unlawful actions.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Upon request, bargain collectively with the United Food and Commercial Workers International Union, Local 23, AFL-CIO-CLC as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Post at its Hempfield Township, Pensylvania, store copies of the attached notice marked "Appendix C."[127] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative shall be posted by it immediately upon receipt thereof and be maintained

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127. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read: "POSTED PURSUANT TO A JUDGEMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material.

(f) Notify the Regional Director for Region 6, in writing, within 20 days from the receipt of this Order, what steps have been taken to comply herewith.

IT IF FURTHER ORDERED that all allegations of unfair labor practices not found herein are dismissed.

Dated, Washington, DC March 28, 1990

s/ John H. West
John H. West
Administrative Law Judge

Appendix C

JD--65--90

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

Case 6-CA-19076 et al.

DAVIS SUPERMARKETS, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL UNION 23, AFL-CIO-CLC

MOTION TO CORRECT TRANSCRIPT

Counsel for the General Counsel respectfully moves that the transcript be corrected as follows:

Page	Line	From	To
9	15	they are into	they are not in
10	23	Greenburgh	Greensburg
14	21 et seq.[1]	Defilbaugh	Defibaugh

1. Defibaugh is erroneously spelled throughout the transcript in several ways, however in all cases it is clear that the individual being discussed is Deborah Defibaugh, a bakery employee.

Appendix C

Page	Line	From	To
17	10	construction	constructive
18	5	some limited by	some limited hand billing by
23	6	submit	admit
25	12 et seq.[2]	Sevecchio	Civiccio
27	18	Loury	Mowery
27	27 et seq.	Moscovich	Miscovich
28	2	Loury	Mowery
31	6	Loury	Mowery
32	24	weken	week ends
37	16	prove	improve
47	6	better than	better then than
79	23	moralization	memorialization
84	22	USCW	UFCW
133	1	inequitable	an equitable
136	3	Mr. Pakar	Mr. Pekar
149	1	blue flash and its protegee	*Blue Flash* and its progeny
152	19	down	done
164	25	unit	union
181	25	can be	cannot be
191	5	Coleen	Pauline
193	3 et seq.	Chalman	Chellman
195	9	mount	mouth
197	22 et seq.	Pauline Wakefield	Pauline Wigfield
209	3	are	area
211	3	Veska	Vesco et seq.
231	14-15	the picket line was misconduct	was picket line misconduct

2. Note, Civiccio is erroneously spelled throughout the transcript, however it is clear in each case that the person being described is Kim Civiccio the front end manager.

Appendix C

Page	Line	From	To
259	4	ADD MARGARET BLACK, DIRECT 399, CROSS 414	
260	8	Mr. Reekl	Mr. Reehl
261	22	882	8(a)(2)
266	25	Russdale	Ruffsdale
268	25 et seq.	Grazik	Grozik
276	2 et seq.	Maschall	Mascolo
280	1	breaking	break
283	6	Elder	Elda
284	10	holdings these here	holding these hearings
285	11	Deb Ogrico	Deb Grieco
292	15	banking	parking
335	16	I	he
336	3 et seq.	Pomybo	Pomiabo
351	20 et seq.	Laura Emanual	Laura Emanuel
357	8	USCW	UFCW
375	25 et seq.[3]	Tofolo	Teffolio
450	5	rout	root
458	11	Glena	Lynna
466	22	Ron	Don
471	6	20th	29th
474	18	Lina	Lynna
474	22	Lina	Lynna
485	9	about	out
536	19 et seq.[4]	Guiletts	Garlits

3. Note, throughout the transcript Teffolio is spelled erroneously, however in no instance where the name is misspelled is it undiscernable that the person being described is Jeff Teffolio, the meat manager.

4. Garlits is spelled erroneously throught the transcript, however the identity of the person being described remains clear as Patrick Garlits, the bakery manager of the Hempfield and Greensburg stores.

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Page	Line	From	To
541	18 et seq.[5]	Aldo	Elda
546	4 et seq.	Roadman	Rodman
552	24	Janet Barr	Janet Barbour
555	9	May	April
559	11	mentioned	motioned
565	4	Angelo	Angela
566	14	Sharrow	Sherrow
566	16	Kasky	Kaskie
568	7 et seq.	Janice	Jannis
577	1 et seq.	Hershel	Harshell
578	12 et seq.	Bedricky	Biedrycki
581	11	rarely	really
600	7	Trauster	Traister
623	17	Cheryl	Sherry
658	16	besides	beside
670	9	barely	rarely
698	14	David	Davis
717	10	open	close
757	2	Cussano	Corsaro
758	15	present	presence
785	13	Norell	Robin
791	16 et seq.	Balazzi	Vallozzi
850	16	were	weren't
851	10	her	here
892	7 et seq.	Drivela	Crivella
901	22	Aalborn's	Ahlborn's
925	18	secons	second
928	20	Mr. Myers	Mr. Reehl

5. The name of Louise Elda, the assistant store manager is spelled erroneously throught the transcript, however her identify remains clear despite the numerous erroneous misspellings.

Appendix C

Page	Line	From	To
932	4	consort	comport
937	1	Mr. Scott	Mr. Myers
949	18	car	card
984	5 et seq.	Metucci	Mattucci
1013	10	Berk	Kean
1031	21	Feffrey	Jeffery
1041	1	be	we
1041	1	shouln't	shouldn't
1063	4	Jula	Kula
1071	17	mena	mean
1122	4	more	move
1128	17 et seq.	Strevessing	Streussing
1151	20	hold	told
1156	6	relevant	irrelevant
1156	15	store	story
1164	17	or	of
1170	16	the	they
1270	10	don't anything	don't know anything
1278	13	where	were
1279	22	sparatic	sporadic
1281	22	19876	1986
1282	3	19896	1986
1305	24	Panicello	Panichella
1319	13	land	and
1323	11	write	right
1873	22	Himpfield	Hempfield
1879	17 et seq.	Rable	Hribal
1880	18	inaccurage	inaccurate
1890	3	wold	would
1890	12	Mr. Wililams	Mr. Myers

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Page	Line	From	To
1891	1	26786	to 6/7/86
1893	19	MacDonalds	McDonalds
1894	10	Colvecchio	Civiccio
1928	23	custimers	customers
1937	16	repitition	repetition
11022	14	wold like to be off	would like to be laid off.
11082	11	kidn	kind
11092	21	you	who
11096	9	Baker	Davis
11164	13	weer	were
11195	7	as	has
11227	17	wish to preclude	wish not to preclude
11244	4	many	main
11259	3	Mr. Scott	the witness
11259	22	Lee Wanna	Luanna
11283	9	Mt. Pleasany	Mt. Pleasant
11301	16	we drunk	he was drunk
11033	22	age	ate
11309	20	whoever	however
11343	24	thin	thing
11347 through 11350 are to be read as follows: 11349, 11347, 11348 and 11350			
11357	5	out	about
11436	1	Gergorish	Gregorich
11439	5	Mr. Williams	Mr. Reehl
11448	24	you're	your
11457	19	Christian	Kristin
11457	20	Brable	Vrable

Appendix C

Respectfully submitted,

s/ Patricia J. Scott
Patricia J. Scott
Counsel for the General Counsel

Dated at Pittsburgh, Pennsylvania
this 7th day of June 1989.

Appendix C

APPENDIX B

PROPOSED STIPULATION: (1) THESE EMPLOYEES ARE IN UNIT SUBJECT TO START AND ENDING DATES.

1. Ahlborn, Helen
2. Alcorn, Mark to 5/2/86
3. Alonzo, Mindy
4. Barbrow, Judy
5. Barnes, Pam
6. Biedrycki, Dave to 7/14/86
7. Biedrycki, Roy to 7/14/86
8. Bennett, Jean
9. Benson, Michele from 5/21/86
10. Bittner, Tracey
11. Black, Margaret to 7/19/86
12. Buhl, Ken
13. Bunner, Scott to 7/14/86
14. Campana, B.J.
15. Chellman, Regina
16. Christner, Cathy to 5/30/86
17. Clark, Ed
18. Colosimo, Theresa
19. Corsaro, Kevin
20. Crivella, Lisa
21. Curry, Shari
22. Cusano, Jody
23. Davis, Karen
24. Davis, Sandy
25. DeMann, Mike
26. Dick, Carol
27. Dick, John
28. Dreistadt, Bev
29. Duncan, Bonnie
30. Emanuel, Laura

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31. Faust, Robbie
32. Fox, Marty from 6/22/86
33. Giallonardo, Mark
34. Godzik, Thomas
35. Goodlin, Cheryl
36. Goodman, Chris
37. Grace, Sam
38. Graham, Scott to 7/14/86
39. Gray, Tom
40. Greaves, Corrine
41. Greico, Debbie
42. Grindle, Debbie
43. Harshall, Randy to 7/14/86
44. Hart, Brian
45. Harte, John from 5/19/86 to 7/14/86
46. Hobaugh, Doug
47. Homchak, Ed to 7/14/86
48. Horsley, Gail
49. Ianni, Sharon
50. Jeffrey, Jennifer
51. Jupena, Robert to 7/14/86
52. Kallok, Michelle to 5/2/86
53. Kellner, Sandra from 4/28/86
54. Kimmel, Cathy
55. Kirkendall, Brian from 6/22/86
56. Kissell, Mary
57. Kitzer, Chris
58. Kunz, Inga
59. Lowry, Tracy to 6/28/86
60. Mancuso, Michele
61. Marchetti, Brian
62. Marshall, Jerry to 5/11/86

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63. Mascolo, Becky to 6/26/86
64. Mathias, Dolores
65. Mattucci, Anita
66. Matusek, Joan
67. McFarlene, Karen
68. Meister, Andrew
69. Merenda, Jerry
70. Miscovich, Charles ((def. to 6/2 longer if found 8(3))
71. Moore, Missy
72. Najewicz, Scott
73. Napolean, Steve
74. Naviglia, Ron
75. O'Brien, Staci
76. O'Neal, Todd
77. Olshefsky, Mary Ann
78. Petril, Alfred to 5/11/86
79. Petrillo, Bob
80. Phillips, Joe
81. Piccar, V. from 6/29/86 to 9/2/86
82. Pomaibo, Patty
83. Rosetti, A.
84. Rusnica, John
85. Sarsfield, Wendy
86. Seigal, Laura from 5/12/86
87. Sherrow, Angie to 7/3/86
88. Shoemaker, Luana
89. Shola, Chari
90. Showalter, Tammie
91. Steiner, Craig to 10/10/86
92. Streussing, Mike to 7/14/86
93. Sullenberger, Marjory
94. Sweltlen, Bob
95. Temple, Melissa
96. Thomas, Jennifer

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97. Tillary, Debbie from 4/26/86 to 6/28/86

98. Thompkins, Bonnie

99. Torrance, Sherri

100. Traister, Tammy

101. Valozzi, Melanie to 5/16/86

102. Vesco, Cathy

103. Wansor, Lynna

104. Watson, Scott

105. Werry, Lee

106. Williams, Paul

107. Matson, Nancy

(2) The following employees are considered in unit to date of termination if lawful and if found unlawful termination then throughout the relevant period (4/86 to 7/14/86).

Defibaugh, Debra*	to 4/19/86
Garris, Charlene	4/19/86
Good, Lance	4/19/86
Hilty, Jennifer	4/19/86
Shotts, Charelene	4/19/86
Welsh, Sonja	4/19/86
Miller, Larry	5/14/86

* So long as not found a supervisor.

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Miscovich, Charles 6/2/86

Kunkel, Linda 7/26/86

Employees who also work at Greensburg

1. Wilbur Albright
2. Janet Barbour
3. James Blaser
4. Antonette Coletri
5. Vicki Cramer
6. Cathy Donaughe
7. Patrick Fetter
8. Ann Howard
9. Eileen Hribal (Orange)
10. Linda Hummel
11. Patti Hutton
12. Brenda Kulyk
13. Don Miller
14. Robin Myers
15. Augie Plevelich
16. Carol Pyle
17. Kim Reich (Ballentine)
18. Robin Ross
19. John Shumaker
20. George Struhala
21. Neil Vario
22. James Weaver
23. Stanley White
24. Pauline Wigfield
25. Lisa Warrick
26. Sandra Wilkinson
27. Stacy Wano

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COLLEGE STUDENTS EMPLOYED AT HEMPFIELD, ELIGIBILITY IN DISPUTE

1. Lisa Arendas
2. Kristin Nath
3. Aimee Panichella
4. Dave Vrable
5. Angela Wimberly

STUDENTS IN COOPERATIVE EMPLOYMENT PROGRAM THROUGH LOCAL HIGH SCHOOLS ELIGIBILITY IN DISPUTE

1. Jamie Boice
2. Valarie Kollar
3. John Kula
4. Tammy Matve
5. Jamie Skewis

OTHERS IN DISPUTE

1. Thomas Howard
2. Anthony Ianni
3. Terry Jackson
4. Laura Marchetti

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5. Brian Mull
6. Tim Sheridan
7. Dick Shibilsky

ADDENDUM TO J-14

THOSE WHO ARE ALSO EMPLOYED AT GREENSBURG

A. Members of the United Steelworkers of America

1. Janet Barbour
2. Antonette Coletri
3. Cathy Donaughe
4. Patrick Fetter
5. Ann Howard
6. Eileen Hribal (Orange)
7. Linda Hummel
8. Brenda Kulyk
9. Don Miller
10. Robin Myers
11. Ausie Plevelich
12. Carol Pyle
13. Robin Ross
14. John Shumaker
15. George Struhala
16. Neil Vario
17. James Weaver
18. Stanley White
19. Pauline Wigfield
20. Lisa Warrick
21. Sandra Wilkinson

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B. Not Members of the United Steelworkers of America

1. Wilbur Albright
2. James Blaser
3. Vicki Cramer
4. Patti Hutton
5. Kim Reich (Ballentine)
6. Stacy Wano

Appendix C

APPENDIX C

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

AFTER A HEARING IN WHICH ALL SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN DECIDED THAT WE VIOLATED THE LAW. WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING;

The National Labor Relations Act gives employees these rights:

To organize;
To form, join, or assist any union;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection; and,
To refuse to do any or all of these things.

WE WILL NOT interrogate an employee regarding the employee's union membership, activities and sympathies and the union membership, activities, and sympathies of fellow employees.

WE WILL NOT create an impression among our employees that their union activities are under surveillance by us.

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WE WILL NOT solicit employee complaints and grievances thereby promising our employees increased benefits and improved terms and conditions of employment.

WE WILL NOT threaten employees with store closure if they selected the Union as their collective bargaining representative.

WE WILL NOT threaten employees with unspecified reprisals if they support the Union.

WE WILL NOT threaten employees that their union organizational activity is futile.

WE WILL NOT threaten employees by accusing them of disloyalty for supporting the Union.

WE WILL NOT make verbal announcements and, through the assistance of the Pennsylvania State Police, discriminatorily refuse to permit the Union to picket and handbill on our Hempfield Township, Pennsylvania property while permitting other organizations access to our property for purposes of soliciting Respondent's customers and related activities.

WE WILL NOT maintain a civil trespass suit against the Union in the Court of Common Pleas of Westmoreland County, Pennsylvania, which enjoins the Union from picketing on Respondent's Hempfield Township premises.

WE WILL NOT threaten to have persons engaged in handbilling on behalf of the Union arrested.

WE WILL NOT cause the Pennsylvania State Police to visit our above-decribed facility.

Appendix C

WE WILL NOT enforce, through the assistance of the Westmoreland County, Pennsylvania sheriff, the injunction we obtained as a result of the above-described civil trespass suit.

WE WILL NOT file and maintain a motion for an Order to Show Cause and for Civil Contempt against the Union and our employees and seek to enforce, by fines and other penalties, the aforementioned injunction.

WE WILL NOT urge our employees to join the United Steelworkers of America, AFL—CIO—CLC and permit the Steelworkers to utilize Respondent's facility, thereby rendering aid and assistance to the Steelworkers.

WE WILL NOT change the work schedule of an employee thereby causing the employee's termination.

WE WILL NOT impose onerous terms and conditions of employment on an employee thereby causing the employee's termination.

WE WILL NOT unlawfully lay off our employees and refuse to recall said employees in retaliation for their exercising rights protected by the National Labor Relations Act.

WE WILL NOT unlawfully discharge an employee and refuse to recall that employee in retaliation for his exercising rights protected by the National Labor Relations Act.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

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WE WILL offer Deborah Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlane Shotts, Sonja Welsh, Larry Miller, Charles Miscovich, and Linda Kunkle immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges and make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them with backpay and interest thereon.

WE WILL remove and expunge from the personnel files of Deborah Defibaugh, Charlene Garris, Lance Good, Jennifer Hilty, Sharlane Shotts, Sonja Welsh, Larry Miller, Charles Miscovich, and Linda Kunkle all documents which relate to our actions which have been found in the attached Decision to be unfair labor practices, and make whatever record changes are necessary to negate the effect of these documents and our unlawful actions.

WE WILL, on request, bargain collectively with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 23, AFL-CIO-CLC as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All full-time and regular part-time employees employed by Davis Supermarkets, Inc. at its Hempfield Township, Pennsylvania, location; excluding confidential employees, students employed pursuant to cooperative education programs and guards, professional employees and supervisors as defined in the Act.

Appendix C

DAVIS SUPERMARKETS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William S. Moorehead Federal Building, Room 1501, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222. Telephone (412) 644-2977.

Supreme Court, U.S.
FILED
FEB 2 1994
OFFICE OF THE CLERK

No. 93-830

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVIS SUPERMARKETS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL UNION 23, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

JAMES R. REEHL
(Counsel of Record)
UFCW LOCAL 23
951 Penn Avenue
Pittsburgh, PA 15222
(412) 261-0301

GEORGE R. MURPHY
PETER J. FORD
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC
1775 K Street, N.W.
Washington, D.C. 20006
(202) 466-1523

Attorneys for Respondent UFCW Local 23

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-830

DAVIS SUPERMARKETS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL UNION 23, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent, United Food and Commercial Workers International Union, Local 23, AFL-CIO-CLC ("Local 23"), has identified a number of inaccuracies or omissions in Petitioner's Statement of the Case that may be material to the Court's consideration of the Petition for Writ of Certiorari. They are as follows:

1. Petitioner states: "On May 23, 1993, approximately 12 individuals appeared at the Hempfield store and engaged in conduct including blocking customer ingress and egress to the supermarket, intimidating customers and em-

ployees, leading at least one customer to express concern for his safety and that of his automobile, using profane language and making threats and obscene gestures, and littering the supermarket premises." Pet. at 9 (citations to the deferred appendix omitted).[1] That statement both contradicts the record and relies on testimony discredited by the National Labor Relations Board ("Board" or "NLRB"). The Administrative Law Judge ("ALJ") found that at no time did the picketers and handbillers interfere with customer ingress or egress or with store deliveries, "act[] in an obstructive manner or otherwise conduct[] themselves in any way but a peaceful manner." 175a-177a and n.112; 183a; 185a. In so doing, the ALJ discredited testimony by Petitioner's witnesses to the contrary. 175a-177a; 183a. The Board affirmed the ALJ's findings and credibility resolutions, 38a and n.2, and the Court of Appeals upheld the Board's order "in all respects." 2a.

2. Petitioner's Statement of the Case does not directly state that six of the individuals who picketed and handbilled at the Hempfield store *were Petitioner's own employees*, including employees it had unlawfully discharged. 30a; 179a; 185a. *Cf.* Pet. at 11. Petitioner also omits mention of the important fact that the purpose of the picketing and handbilling was to protest Petitioner's unfair labor practices. 4a; 28a; 30a; 39a; 101a-102a; 179a.[2]

3. Petitioner's Statement of the Case does not directly state that Petitioner, while denying Local 23 and employees access to its property to picket and distribute

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[1] References to the Petition for Writ of Certiorari are designated as: Pet. at ——. References to the appendix filed with the Petition for Writ of Certiorari are designated as: ——a.

[2] As the Court of Appeals observed, the Board views the right to protest unfair labor practices as one of the core rights guaranteed in Section 7 of the National Labor Relations Act ("Act"). 31a. *See, e.g., United Supermarkets*, 283 N.L.R.B. 814, 815-16 (1987); *Jean Country*, 291 N.L.R.B. 11, 13 & 17 (1988).

handbills to the public, granted other organizations access to its property. 28a-29a; 31a-32a; 39a-41a; 175a.[3] *Cf.* Pet. at 10. The Court of Appeals found Petitioner's "discriminatory behavior was particularly egregious" because Petitioner allowed Steelworkers' representatives "*inside* the store to recruit employees and to distribute authorization cards and contracts." 31a.

4. Petitioner's Statement of the Case fails to note the lack of any record evidence that Petitioner had a policy barring access to its premises by outside organizations or off-duty employees. *See* 41a n.6.

5. Petitioner states that notwithstanding a May 28, 1986 state court injunction "enjoining Local 23 from entering the store grounds and limiting pickets to three at each parking lot entrance . . ., Local 23 and Petitioner agreed to permit Local 23 greater access to the property than that provided in the injunction." Pet. at 9. This statement is misleading. On May 23, 1986—the day the picketing and handbilling commenced—Petitioner filed a civil trespass suit in state court. The next day, the court entered a consent order whereby *during the term of the order* picketers were enjoined from entering Petitioner's property and handbillers had limited access to a portion of the parking lot at Petitioner's Hempfield store; *the order only remained in effect until May 28, 1986.* 105a-106a. On May 28th, the court entered a second order enjoining Local 23 and its agents:

> from picketing [Petitioner's] place of business except for three pickets who may be stationed at each entrance to the parking lot of the premises, *off the property of* [*Petitioner*], which pickets may carry informational signs and pass out leaflets but shall not

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[3] Indeed, on the same day it refused to allow the pickets to remain in front of its store, Petitioner permitted a charitable organization to set up a table on its storefront sidewalk and sell raffle tickets for a car parked in the lot in front of the store. 39a.

> physically impede or stop the movement of the traffic to and from the parking lot. Joint Exhibit 4.

109a (emphasis added). Thus, after May 28, 1986, there was no formal agreement between Petitioner and Local 23 permitting picketers and handbillers *any* access to Petitioner's property.[4] Moreover, as Petitioner acknowledges, Pet. at 9-10, and the Court of Appeals found, 5a; 28a; 32a, when picketing resumed in late July, after Local 23 filed an unfair labor practice charge on June 2, 1986 concerning the denial of access *and the NLRB's General Counsel issued a complaint* on July 25, 1986 concerning that matter, Petitioner "conducted a relentless campaign to keep the pickets off its property" by seeking to enforce the state court injunction through the county sheriff and contempt proceedings against Local 23 and individual picketing employees.

6. Petitioner states that employees regularly worked at both its Hempfield and Greensburg stores from the time the Hempfield store opened. Pet. at 8. However, Petitioner fails to mention the Board's findings that the 11 employees in question: were employed at the Greensburg store and were members of the Steelworkers, which represented employees at the Greensburg facility; remained under the primary supervision of their Greensburg store supervisors and spent the majority of their working hours at the Greensburg store; performed the same work as they performed at Greensburg when they did work at the Hempfield store; and were expressly covered by a collective bargaining agreement between Petitioner and the Steelworkers. 44a; *see also* 187-191a. The Court of Appeals upheld the Board's findings. 17a-19a.

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[4] Although Petitioner did informally agree to allow two employees to handbill in its parking lot after obtaining the May 28, 1986 injunction, it later sought and obtained a total ban of all activities on its property after several weeks of peaceful handbilling. 175a.

SUMMARY OF ARGUMENT

1. The Board's conclusion that Petitioner violated Section 8(a)(1) of the Act by continuing to prosecute state court trespass litigation after the General Counsel issued a complaint concerning the denial of access was based on a permissible construction of the Act fully consistent with Supreme Court precedent. The Board's conclusion was based on its decision in *Loehmann's Plaza*, 305 N.L.R.B. 663 (1991). The Board in *Loehmann's Plaza* carefully construed and applied this Court's opinions in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), and *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986). Based on this precedent, the Board permissibly determined that the General Counsel's decision to issue a complaint establishes an arguable case of protection, and thus federal preemption. In any event, the picketing and handbilling in question was found to be *actually*—not just *arguably*—protected by the Act; therefore, Petitioner's preoccupation with the question of whether the complaint made out an *arguable* case of protection is completely misplaced.

Petitioner argues that the Board's sole remedy to prevent an employer's use of state process to interfere with employee exercise of Section 7 rights after the Board has issued a complaint is to obtain a federal court injunction pursuant to Section 10(j) of the Act to oust the state court of jurisdiction. That argument is meritless. While a federal court injunction is plainly an available remedy *against the state court*, it does not detract from the existence of a remedy under the Act against the employer itself. Finally, it is simply untrue that employers in Petitioner's position are deprived of access to the state courts even where the Board later finds the union's conduct to be unprotected by the Act. *Loehmann's Plaza* merely requires an employer to *stay*, not *dismiss*, a pend-

ing state court trespass lawsuit after the General Counsel issues a complaint. If the Board later dismisses the complaint, the employer may renew the state court lawsuit.

2. The Board's finding that Petitioner violated Section 8(a)(1) of the Act by discriminatorily denying access to Local 23 and employee picketers and handbillers is supported by substantial evidence and raises no issues of general public importance. Petitioner's suggestion that the Board has circumvented the Court's holding in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992) is highly misleading. The facts of *Lechmere* are clearly distinguishable and the disparate treatment rule that the Board applied to find a violation in this case has been explicitly endorsed by this Court.

Petitioner's real quarrel is with the Board's factual findings regarding the evidence of disparate treatment. Substantial evidence supports the Board's findings, which were in part based on the ALJ's credibility resolutions. By seeking review on the disparate treatment issue, Petitioner ignores this Court's opinion in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

3. The Board's decision to exclude 11 "dual function" or "dual location" employees from the bargaining unit is consistent with applicable precedent. This Court has held that the Board is accorded broad discretion in making bargaining unit determinations. For these reasons, the status of the disputed employees is only of importance to the parties in this case.

ARGUMENT

I. THE BOARD'S CONCLUSION THAT PETITIONER VIOLATED SECTION 8(a)(1) OF THE ACT BY CONTINUING TO PROSECUTE STATE COURT TRESPASS LITIGATION AFTER A COMPLAINT ISSUED WAS BASED ON A PERMISSIBLE CONSTRUCTION OF THE ACT FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT

The sole ground upon which Petitioner urges the Court to grant certiorari as to the first question presented is that the Board's decision below—upheld by the Court of Appeals—and the rule of *Loehmann's Plaza,* 305 N.L.R.B. 663 (1991) upon which it was based are allegedly inconsistent with this Court's opinions in *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731 (1983), *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180 (1978) and *International Longshoremen's Ass'n. v. Davis,* 476 U.S. 380 (1986). As we demonstrate below, Petitioner's argument does not withstand scrutiny.

In *Loehmann's Plaza,* the Board held that once the Board's General Counsel issues a complaint alleging the unlawful exclusion of employees or union representatives from an employer's property, an employer who either initiates a state court proceeding against an asserted trespass or who fails to take prompt action to stay an already commenced proceeding violates Section 8(a)(1) of the Act. 305 N.L.R.B. at 671-72.

Petitioner attacks that holding as contrary to the holding in *Bill Johnson's* that there is a "right of access to the courts" which is "an aspect of the First Amendment right to petition the Government for redress of grievances." Pet. at 13. The existence of a right of access to the courts is simply beside the point. The point is that there can be no right of access to state courts as to matters over which they lack jurisdiction, e.g., on preemption grounds. Indeed, as Petitioner concedes, *id.*, the Court in *Bill John-*

son's noted that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal law preemption. . . ." 461 U.S. at 737-38 n.5.[5] Since, as we show below, the state court trespass suit was preempted upon the General Counsel's issuance of a compalint, footnote five of *Bill Johnson's* plainly forecloses Petitioner's claim that it has a constitutional right to have its trespass claim determined by the state courts.[6]

Contrary to Petitioner's suggestion, Pet. at 15-16, in reaching its decision, the *Loehmann's Plaza* Board carefully construed and applied this Court's opinions in *Bill Johnson's, Sears* and *Davis,* as well as *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959). *Loehmann's Plaza,* 305 N.L.R.B at 669-71. *Garmon* and *Sears* clearly establish that federal preemption of state court jurisdiction occurs "at least by the time the General Counsel has acted to place the issue before the Board by issuing a complaint." *Id.* at 670 (footnote omitted). In *Garmon,* the Court announced the following broad rule concerning federal preemption:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts

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[5] What Petitioner neglects to mention is that the Court further stated that the Board may enjoin such suits. *Id.* Pursuant to footnote five of *Bill Johnson's,* the Board has enjoined employers from maintaining preempted lawsuits interfering with conduct protected by the Act. *See, e.g., American Pacific Concrete Pipe Co.,* 292 N.L.R.B. 1261 (1989); *Loehmann's Plaza, supra*; *Great Scot, Inc.,* 309 N.L.R.B. No. 84 (1992).

[6] No serious constitutional questions are raised by an order prohibiting a party from maintaining a preempted lawsuit. No basis therefore exists for applying the canon of statutory construction utilized in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575 (1988). On the other hand, the state court's injunction and decision rejecting Local 23's preemption defense collided with the Supremacy Clause in Article VI of the United States Constitution. *See Davis, supra,* 476 U.S. at 388 ("Pre-emption [is] the practical manifestation of the Supremacy Clause").

> must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national labor policy is to be averted. 359 U.S. at 245.

This Court has applied the *Garmon* preemption rule in numerous subsequent cases, including *Sears*. *See Sears, supra,* 436 U.S. at 187-90. The question presented in *Sears* was whether the Act "deprives a state court of the power to entertain an action by an employer to enforce state trespass laws against picketing which is arguably—but not definitely—prohibited or protected by federal law." *Id.* at 182. This Court held that the state court trespass suit was not preempted; however, the holding was predicated on the fact that the picketing union never filed an unfair labor practice charge, and thus the employer had no means of invoking the Board's jurisdiction to determine whether the trespassory picketing was protected under the Act. *See, e.g., id.* at 201-03 & 207.

Insofar as Petitioner contends that a state court trespass suit is not preempted by the Board's exclusive jurisdiction until the Board issues a decision finding a violation of Section 8(a)(1), there is no support in any of the *Sears* opinions for such an extreme position. As the Court of Appeals observed, Justice Stevens' majority opinion did not specifically state when preemption occurs, but it "strongly suggested that the union's filing of an unfair labor practice charge is sufficient in and of itself to trigger preemption." 34a; *see, e.g., Sears, supra,* at 206 (to avoid risk that state court will enjoin protected trespassory activity, "the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum"); *id.* at 207 (if the union files an unfair labor practice charge, "the protection question would then be decided by the agency experienced in accommodating . . . § 7 . . . and . . . property rights . . . in the context of a labor dispute"). Justice Blackmun's and Justice Powell's concurrences dated preemption as of the filing of the charge and the issuance of the complaint, respectively, while the three dissenting Justices argued that trespass suits are preempted

even in cases where the union does not file a charge. 34a; *Sears, supra,* at 209 (Blackmun, J. concurring); *id.* at 212-14 (Powell, J., concurring); *id.* at 222-24 (Brennan, J., dissenting).

The Board's rule in *Loehmann's Plaza* was thus based on the most conservative approach taken in the various *Sears* opinions, that of Justice Powell. 34a. In determining that the General Counsel's issuance of a complaint is what triggers preemption, the *Loehmann's Plaza* Board was influenced in large measure by this Court's opinion in *Davis,* particularly the quoted passage from *Davis* reproduced at page 15 of the Petition.[7] 305 N.L.R.B. at 670.

Petitioner relies on this passage from *Davis* to support its *apparent* contention that, even if preemption occurs upon the General Counsel's issuance of a complaint, an employer who has filed a state court trespass action should nevertheless be permitted to have the preemption issue resolved by a court. Pet. at 16-18.[8] However, *Davis*

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[7] The quoted passage is as follows:

> The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim, without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board . . . . The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

Davis, supra, 476 U.S. at 394-95.

[8] We emphasize the word "apparent" because Petitioner concedes that its First Amendment right to petition the government for a redress of grievances is "meaningful" if the General Counsel "proceed[s] to a Board hearing on the complaint and seek[s] a cease

provides no support for this specious argument. In the first place, *Davis* makes clear that: (1) Congress vested the Board with exclusive jurisdiction over administration of the Act; (2) the Board's exclusive jurisdiction necessarily, "by operation of the Supremacy Clause, pre-empt[s] conflicting state court jurisdiction" and; (3) the Board's "administrative rather than judicial [capacity] . . . does not alter the pre-emptive effect of the federal law." 476 U.S. at 393 n.11. Secondly, *Davis* teaches that the party asserting preemption has "the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted." *Id.* at 396. Where such a showing is made, however, the preemption issue is "to be decided initially by the NLRB, not the state courts." *Id.* at 394.[9]

The Board in *Loehmann's Plaza* permissibly determined that the burden of showing that trespassory union picketing or handbilling is arguably protected by the Act is satisfied by the General Counsel's decision to issue a complaint. 305 N.L.R.B. at 670. As the Court of Appeals succinctly observed:

> "[B]efore the General Counsel issues a complaint, he conducts an investigation in order 'to ascertain, ana-

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and desist order or other appropriate relief if the allegations are decided in its favor." Pet. at 18. That is precisely what occurred in this case. Moreover, Petitioner litigated the preemption issue at every stage of the unfair labor practice proceedings, i.e., before the ALJ, Board and Court of Appeals. 5a-6a; 32a-36a; 41a-43a; 167a-185a. Additionally, Petitioner litigated the preemption issue in the state court proceedings. 105a-106a; 109a; 119a-124a.

[9] In *Davis*, no unfair labor practice charge was filed concerning whether Davis was an "employee" covered by the Act, *id.* at 383-85; thus, the state court entertaining Davis' tort claim was the only forum presented with the preemption issue. Here, in contrast, Local 23 filed a charge, which invoked the Board's jurisdiction to decide the preemption issue. The fact that the state court resolved the preemption issue against Local 23 after the state court's jurisdiction was preempted by the Board's General Counsel's issuance of a complaint, 41a-42a; 119a-121a, highlights the constitutional infirmity with Petitioner's position.

> lyze and apply the relevant facts.'" [*Loehmann's Plaza*], 305 N.L.R.B. No. 81 at 8 (citing NLRB Casehandling Manual). According to the Board's regulations, a complaint will issue only if "the charge appears to have merit." 29 C.F.R. § 101.8. "If investigation reveals that there has been no violation of the Act or evidence is insufficient to substantiate the charge," no complaint will issue. 29 C.F.R. § 101.5. The Company cannot credibly contend that a claim that makes it through this gauntlet does not concern conduct "arguably" protected by the NLRA.

35a-36a. In view of the thorough investigation of unfair labor practice charges conducted by the General Counsel before deciding whether to issue a complaint, an unfair labor practice complaint plainly represents far more than "mere allegations of a violation of the Act by the Board's General Counsel." Pet. at 16 & 18.

In any event, in this case the General Counsel presented credible evidence in support of the complaint at a hearing before an ALJ, who made findings and conclusions to the effect that Petitioner unlawfully maintained its state court trespass lawsuit post-complaint, the Board affirmed the ALJ's findings and conclusions, and the Court of Appeals upheld the Board's decision and order. The picketing and handbilling in question was thus *actually*—not just *arguably*—protected by the Act. Even Petitioner agrees that "there is a constitutional objection to state-court interference with conduct actually protected by the Act." *Sears, supra,* 436 U.S. at 199 (footnote omitted). *See* Pet. at 17 n.3. Given the *actually* protected nature of the picketing and handbilling, Petitioner's preoccupation with the question of whether the complaint made out an *arguable* case of protection is completely misplaced.

In this regard, Petitioner, citing footnote 43 of the majority opinion in *Sears,* proposes a rule whereby the Board, following issuance of a complaint, must obtain a federal court injunction pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j), to oust the state court of jurisdiction. Pet. at 17-18. This proposal is utterly meritless.

First, it ignores this Court's admonition in *Garmon* that where arguably protected conduct is involved, "the federal courts" as well as state courts "must defer to the exclusive competence of the . . . Board." 359 U.S. at 245. Second, the four opinions in *Sears* teach that the Board's jurisdiction becomes exclusive no later than the point when the General Counsel decides to issue a complaint. Third, neither footnote 43 of *Sears* nor the cases cited therein even remotely suggest that a state court order enjoining conduct protected by the Act is not preempted unless and until the Board persuades a federal judge to enjoin the state court proceedings.[10] Fourth, Section 10(j) injunctions are extraordinary remedies. Petitioner's proposed rule would unduly burden both the Board's and the federal judiciary's limited resources. Fifth, Petitioner improperly assumes that state court judges faced with a claim that a trespass suit is preempted by federal law will invariably reject such claims; experience shows that many state courts duly consider the applicable federal jurisprudence regarding preemption. *See, e.g., Loehmann's Plaza, supra,* 305 N.L.R.B. at 671 n.52 and cases cited therein. Thus, no legitimate purpose would be served by a rule requiring the Board to pursue a Section 10(j) injunction.

Finally, it is simply untrue that under the *Loehmann's Plaza rule*, "an employer such as Petitioner is deprived of its access to the state courts—even if a union's conduct is later found by the Board to be unprotected under the Act." Pet. at 16. *Loehmann's Plaza* merely requires an employer to *stay*, not *dismiss*, a pending state court lawsuit within seven days of the General Counsel's issuance of an unfair labor practice complaint. 305 N.L.R.B. at 671. If the Board later dismisses the complaint, the employer may renew its state court lawsuit. *Id.* at 672 n.56

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[10] Petitioner erroneously states, Pet. at 17, that *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971) and *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954) are examples of the Board requesting an injunction from a federal district court pursuant to Section 10(j) of the Act. *See* 404 U.S. at 142; 347 U.S. at 502-04.

("state court jurisdiction is preempted [only] until such time as the Board holds the picketing or handbilling to be unprotected"). *Accord*, *Davis*, *supra*, 476 U.S. at 397 (court must defer to Board if there is an arguable case for preemption but "if the Board decides that the conduct is not protected or prohibited . . . the court [may] entertain the litigation").

In sum, the Board's conclusion that Petitioner violated Section 8(a)(1) of the Act by maintaining its state court trespass suit after the General Counsel issued a complaint concerning the denial of access was based on a permissible construction of the Act consistent with this Court's precedent. The Board is entitled to judicial deference where, as here, it interprets an ambiguous provision of the statute it administers. *NLRB v. Food & Commercial Workers, Local 23*, 484 U.S. 112, 123 (1987). *Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837, 842-43 (1984). And where, as here, the Board's construction of the Act is "reasonable," it should not be rejected "merely because the courts might prefer another view of the statute." *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95, 114 (1985), quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). Petitioner's first question presented does not warrant review.

II. THE BOARD'S FINDING THAT PETITIONER VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCRIMINATORILY DENYING ACCESS TO LOCAL 23 AND EMPLOYEE PICKETERS AND HANDBILLERS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND RAISES NO ISSUES OF GENERAL PUBLIC IMPORTANCE

Regarding the second question presented, Petitioner urges the Court to grant certiorari solely on the ground that the Board's "repeated reliance" on a disparate treatment analysis in decisions issued after this Court's opinion in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992) al-

legedly "makes the discriminatory access issue one of general public importance." Pet. at 19 & 23. Petitioner's argument, we submit, is frivolous and should be categorically rejected.

Petitioner suggests that the Board has circumvented the holding in *Lechmere* that an employer with a nondiscriminatory no-solicitation/distribution policy did not violate the Act by ejecting from its property nonemployee union organizers seeking to organize its employees because the employees were otherwise accessible to the union, 112 S.Ct. at 843-44, 849-50, by "affirming Section 8(a)(1) findings originally based upon the accommodation principles of *Jean Country*, 291 N.L.R.B. 11 (1988), by finding a discriminatory denial of access to union pickets." Pet. at 19 (citations omitted). This suggestion is highly misleading.

From the outset this case was litigated based on a disparate treatment theory. 54a-56a. As Petitioner concedes, the ALJ "found that Petitioner violated Section 8(a)(1) by discriminatorily refusing to permit Local 23 to picket and handbill on its Hempfield property 'while permitting other organizations access to its property for purposes of soliciting its customers and related activities'" and the Board "upheld the 8(a)(1) finding, 'solely because of [Petitioner's] disparate treatment of protected union activity.'" Pet. at 19 (citations to deferred appendix omitted). This is clearly not a case in which the Board changed its legal theory midstream to circumvent a decision of this Court. Nor has the Board "repeatedly" relied on a disparate treatment analysis in every case involving denials of access to private property it has decided since *Lechmere*. *See, e.g., Bristol Farms, Inc.*, 311 N.L.R.B. No. 46 (1993); *Payless Drug Stores Northwest, Inc*, 311 N.L.R.B. No. 68 (1993).

Lechmere's applicability to this case is marginal, at best. In contrast with the record evidence herein, there was no evidence in *Lechmere* that the employer discrimi-

natorily denied the union access to its property while permitting other groups access; in fact, "Lechmere consistently enforced [its no-solicitation/distribution] policy . . . (against, among others, the Salvation Army and the Girl Scouts)." 112 S.Ct. at 844 n.1.[11] And *Lechmere* reaffirmed this Court's decisions in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), both of which explicitly endorsed the Board's longstanding disparate treatment theory. *See, e.g., Babcock & Wilcox, supra*, at 112 (emp'oyer may deny access to nonemployee union organizers to distribute union literature to employees if employer "does not discriminate against the union by allowing other distribution"); *Sears, supra*, at 205 (to gain access, union may show that "the employer's access rules discriminate against union solicitation") (footnote omitted).[12]

Moreover, whereas in *Lechmere* the persons denied access were nonemployee union organizers, in this case the persons denied access included Petitioner's own employees. This Court has stressed that there is a substantial "distinction between rules of law applicable to employees and those applicable to nonemployees." *Babcock & Wilcox, supra*, at 113 (footnote omitted); *Lechmere, supra*, at 846; *see also Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Accordingly, even if there was no evidence that Petitioner's access rules were discriminatory, the holding in *Lechmere* would not control the outcome of this case.

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[11] In this case, there was no record evidence that Petitioner even had a no-solicitation/distribution policy.

[12] The majority opinion in *Lechmere* rejected the Board's "accommodation," or "multi-factor balancing," test adopted in *Jean Country*, at least as applied to nonemployee union organizers. 112 S.Ct. at 847-48. However, the Court did not disturb the disparate treatment prong of the *Jean Country* standard. *See Jean Country, supra*, 291 N.L.R.B. at 12 & n.3.

Petitioner's real quarrel is with the factual findings the Board made regarding the record evidence of disparate treatment. Pet. at 19-21 & 23. Among other things, Petitioner argues that: it only granted isolated access to charitable organizations and representatives of another union; it "permitted" Local 23 access pursuant to an agreement with the union; it "imposed nothing more than legitimate 'time, place, and manner' restrictions on the conduct at issue," and; Local 23 engaged in "mass picketing" that caused "disruption" to business. *Id.* However, substantial evidence in the record supports the Board's factual findings, which in part were based on credibility resolutions made by the ALJ. Indeed, the Court of Appeals "uph[e]ld the Board's order in all respects," finding it "completely supported by the facts and . . . based on the proper application of federal labor law." 2a.[13] Thus, by seeking review on the disparate treatment issue, Petitioner ignores this Court's admonition in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951):

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Id.* at 490-91.

Plainly, the Board's reliance on the disparate treatment theory, a theory long employed by the agency and specifically endorsed by this Court, does not make the second issue presented one of public importance. And Petitioner's disagreement with the agency's factual findings concerning disparate treatment certainly is not a matter of public importance which merits an expenditure of the

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[13] The Court of Appeals observed that its decision was "largely fact-driven, as were the Board's determinations." 3a.

Court's time and resources. Therefore, the Court should deny review.

III. THE BOARD'S DECISION TO EXCLUDE 11 "DUAL FUNCTION" OR "DUAL LOCATION" EMPLOYEES FROM THE BARGAINING UNIT IS CONSISTENT WITH APPLICABLE PRECEDENT AND RAISES NO ISSUES OF GENERAL PUBLIC IMPORTANCE

Contrary to Petitioner's assertion that it "involves an issue of general public importance rather than one of concern only to the parties to this dispute," Pet. at 28-29, the third question presented concerns matters so plainly insubstantial that it warrants only brief comment. This Court has held that in making bargaining unit determinations such as the one at issue here, "the Board is accorded broad discretion," *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971), and its decisions are "rarely to be disturbed." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

Here, the Board's decision to exclude the 11 "dual function" (or, as the Court of Appeals termed them, "dual location") employees from the bargaining unit is entitled to deference: it was well-reasoned and supported both by applicable Board precedent, *see, e.g., Otasco, Inc.*, 278 N.L.R.B. 376 (1986), and the Court of Appeals' decision in *Bentsen Contracting Co. v. NLRB*, 941 F.2d 1262, 1265-67 (D.C. Cir. 1991).[14] Contrary to Petitioner's suggestion, Pet. at 24-25 & 28, the Board's determination to exclude the 11 employees does not conflict with *Berea Publishing Co.*, 140 N.L.R.B. 516 (1963). Unlike the instant case, *Berea Publishing* did not involve employees represented by another union at their primary workplace and covered by a collective bargaining agreement between the employer and the other union. Hence, there was no danger of "including the same job

[14] Petitioner's efforts to distinguish *Otasco* and *Bentsen Contracting*, Pet. at 26-28, are clearly unpersuasive.

categories in two bargaining units[, an outcome] . . . necessarily at odds with the principle of exclusive representation." *Bentsen Contracting, supra,* at 1267.

In view of the broad discretion accorded to the Board's bargaining unit determinations and the absence of any conflict between the instant unit determination and applicable Board or judicial precedent, the status of the 11 "dual function" employees is only of importance to the parties in this case. We submit that the real reason why Petitioner pursues this issue is because, as it argued to the Board, "including [the employees] in the unit would negate the Union's majority status." 43a. While Local 23's majority status is important to the parties, it does not involve an issue of general public importance warranting the attention of this Court.

CONCLUSION

For the foregoing reasons, Local 23 respectfully requests that the Court deny the Petition for Writ of Certiorari filed by Davis Supermarkets, Inc.

Respectfully submitted,

JAMES R. REEHL
(Counsel of Record)
UFCW LOCAL 23
951 Penn Avenue
Pittsburgh, PA 15222
(412) 261-0301

GEORGE R. MURPHY
PETER J. FORD
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC
1775 K Street, N.W.
Washington, D.C. 20006
(202) 466-1523

Attorneys for Respondent
UFCW Local 23

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No. 93-830

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVIS SUPERMARKETS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DANIEL SILVERMAN
Acting General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by continuing a civil trespass action against a union after the Board's General Counsel had issued a complaint alleging that the union's conduct was protected by the Act.

2. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) of the Act by discriminatorily refusing to permit employees who supported one union to picket or handbill on its property, while granting access to representatives of a rival union and other groups.

3. Whether the Board reasonably concluded that 11 employees who worked at petitioner's Greensburg store, but were assigned on a part-time or a temporary basis to its Hempfield store, should not be included in the Hempfield bargaining unit.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 2 F.3d 1162. The decision and order of the National Labor Relations Board (Pet. App. 37a-52a) and the decision of the administrative law judge (Pet. App. 53a-211a) are reported at 306 N.L.R.B. 426

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1993. The petition for a writ of certiorari was filed on November 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns and operates supermarkets in Greensburg and Hempfield Township, Pennsylvania. Employees working at petitioner's Greensburg store are represented by the United Steelworkers of America (Steelworkers). In March 1986, Local 23, United Food and Commercial Workers International Union (Local 23), launched a campaign to organize employees working at the Hempfield store, who were not then unionized. By April 19, 13 Hempfield employees had signed authorization cards for Local 23. On that date, petitioner summarily laid off six of them. On May 1, Bob Davis, chairman of petitioner's board of directors, held two separate meetings with employees at the Hempfield store, telling those assembled that he wanted them to sign authorization cards for the Steelworkers. After those meetings, Steelworkers officials and Greensburg employees distributed Steelworkers' authorization cards and copies of the Steelworkers' labor contract covering the Greensburg store. In May, petitioner discharged two more employees who had signed authorization cards for Local 23. Pet. App. 2a-4a.

Despite petitioner's conduct, Local 23 concluded that it had attained majority support among the Hempfield employees. On May 2, Local 23 filed a petition with the National Labor Relations Board (Board) for a representation election. On May 13, Local 23 made a continuing request to petitioner to commence bargaining. By May 24, a majority of the Hempfield employees (58 of 109) had signed authorization cards for Local 23. Petitioner, however, refused to bargain with Local 23. Pet. App. 4a, 44a n.10, 91a, 205a.

On May 23, Local 23 protested petitioner's actions by picketing on the sidewalk in front of the Hempfield store.

Twelve picketers, six of whom were employees of petitioner, distributed handbills to customers and carried signs requesting customers not to patronize the store because petitioner "has committed unfair labor practices designed to deny employees their rights under the [National Labor Relations Act]." Pet. App. 30a, 39a, 102a n.64. The same day, May 23, petitioner filed a civil trespass action against Local 23 in state court, seeking an injunction prohibiting the picketers from entering the Hempfield store property. *Id.* at 105a & n.69. On May 28, the state court issued an injunction that barred Local 23 from all picketing and handbilling on petitioner's property, but permitted three picketers to station themselves off petitioner's property at each of two entrances to the parking lot and to offer handbills to customers there. *Id.* at 41a, 109a.

On June 2, Local 23 filed an unfair labor practice charge with the Board challenging petitioner's refusal to allow employees to picket and engage in other concerted activities on its property. Pet. App. 109a-110a. On July 22, petitioner called the state police in response to resumed efforts by picketers to picket on petitioner's property. Local 23, fearing a loss of employee support, requested cancellation of the representation election, which had been scheduled to take place on July 25, and the Board granted the request. *Id.* at 4a, 5a, 41a-42a.

On July 25, the Board's General Counsel issued a complaint against petitioner based on Local 23's unfair labor practice charge. The complaint alleged that petitioner violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), by denying Local 23 access to the Hempfield store property and by maintaining its civil trespass suit in state court to enjoin Local 23 from

picketing there.[1] Pet. App. 41a. Despite the General Counsel's issuance of the unfair labor practice complaint, petitioner continued to exclude picketers from its Hempfield property by seeking enforcement of the state court's injunction. On August 2, a deputy sheriff handed picketers a document that indicated that they were not allowed to enter the parking lot. When a number of laid-off employees resumed picketing on the sidewalk in front of the store, petitioner, on November 26, obtained an order from the state court directing Local 23 and those picketers to show cause why they should not be held in contempt of the injunction. *Id.* at 5a, 42a, 122a-123a.

2. a. After a hearing, the Board's administrative law judge (ALJ) concluded that petitioner violated Section 8(a)(1) of the Act, by discriminatorily refusing to permit Local 23 to picket and handbill on the Hempfield property while permitting other organizations access to the property for the purpose of soliciting its customers. Pet. App. 203a. In so concluding, the ALJ credited the testimony of witnesses that established that petitioner routinely allowed a variety of groups to solicit customers on the sidewalk in front of the store. *Id.* at 175a.[2]

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[1] Shortly thereafter, on July 29, Local 23 filed a motion in state court for dismissal of petitioner's trespass suit on the ground that it was preempted by the issuance of the General Counsel's unfair labor practice complaint. The court denied Local 23's motion, opining that "[i]f the effect of [f]ederal [l]aw is to preempt this Court's action, then such preemption should be pursued through the [f]ederal system." Pet. App. 120a.

[2] For example, employee Defibaugh testified that on May 23, the first day of picketing, several individuals had set up a table on the sidewalk in front of the store and were selling raffle tickets to raise money for an organization. She also testified that, around holidays, there were usually church groups or school organizations in front of the store selling tickets or other items. Pet. App. 104a-

The ALJ also concluded that petitioner violated Section 8(a)(1) by maintaining its trespass suit against Local 23 in state court. Pet. App. 203a. The ALJ determined that, although petitioner's "filing of the trespass action, in and of itself" was not unlawful, "maintaining the trespass action * * * [after Local 23] filed a charge and a complaint was issued by the Board is another matter." *Id.* at 179a. The ALJ explained that Section 7 of the Act, 29 U.S.C. 157, "gives employees the right to picket their own employer at the primary location," and found that some of the individuals who stationed themselves in front of the Hempfield store on the first day of picketing were in fact petitioner's own employees. Pet. App. 178a-179a. The ALJ then observed that, under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the Act preempts state-court jurisdiction over a lawsuit when activity at issue is "arguably protected" by Section 7. *Id.* at 180a-181a.[3] Because the General Counsel's complaint and petitioner's state court action involved the same controversy, the ALJ concluded that, once the General Counsel's complaint issued, "[s]tate jurisdiction was pre-empted." *Id.* at 183a, 185a n.118. The ALJ rejected petitioner's contention that it was authorized to pursue its lawsuit under *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983). The ALJ concluded that *Bill Johnson's* does not assist petitioner, because its lawsuit was preempted by the Act and had been

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105a. Employee Harshell corroborated Defibaugh's testimony. *Id.* at 105a n.68.

[3] In *Garmon*, this Court held that "[w]hen an activity is arguably subject to [Section] 7 or [Section] 8 of the Act, the States * * * must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245.

maintained for a retaliatory purpose.[4] Pet. App. 183a-184a.

In addition to the foregoing violations of Section 8(a)(1), the ALJ found that petitioner had committed numerous other unfair labor practices during the course of Local 23's organizing campaign at the Hempfield store. Pet. App. 202a-205a.[5] To remedy petitioner's violations of the Act, the ALJ applied *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and stated that, "[i]n view of the degree and pervasiveness of the unfair labor practices," it was necessary for the Board to order petitioner to bargain with Local 23, since "the holding of a fair election is no longer possible." Pet. App. 201a. The ALJ found that a majority of the Hempfield employees had signed authorization cards for Local 23 in May 1986, and that "[i]t is obvious that [petitioner] intended by its unlawful conduct to dissipate [Local 23's] majority status." *Id.* at 199a-

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[4] In *Bill Johnson's*, the Court held that the Board can enjoin as an unfair labor practice a lawsuit that was "filed with [a] retaliatory intent" only if the lawsuit has no "reasonable basis." 461 U.S. at 749. The Court stated that this rule applied when the lawsuit was one that "federal law would not bar except for its allegedly retaliatory motivation." *Id.* at 737 n.5. The Court emphasized, however, that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law." *Ibid.*

[5] For example, the ALJ found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by laying off six employees in April 1986, and that petitioner violated Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by urging Hempfield employees to join the Steelworkers and by otherwise rendering aid and assistance to the Steelworkers. The Board affirmed these unfair labor practice findings, which were upheld by the court of appeals, Pet. App. 6a-13a, 27a-28a, 38a-39a, 38a n.3, and no issue involving them is presented here.

200a, 202a. In determining that Local 23 had achieved majority status in May, the ALJ excluded from the Hempfield bargaining unit 11 employees, who worked at both the Greensburg and the Hempfield store, because they did not share a sufficient community of interest with the Hempfield employees. *Id.* at 189a-191a.

b. The Board affirmed the ALJ's unfair labor practice findings and adopted his bargaining order. Pet. App. 38a. The Board agreed with the ALJ that petitioner violated Section 8(a)(1) by its "disparate treatment of protected union activity" in granting access to the Hempfield store property. *Id.* at 41a. The Board explained that an employer may not bar access when it "discriminate[s] against the union by allowing other distribution" on its property. *Id.* at 40a (quoting *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). In this case, the Board found sufficient evidence that petitioner had engaged in antiunion discrimination. *Id.* at 40a-41a.[6]

The Board also agreed with the ALJ that petitioner violated Section 8(a)(1) by maintaining its civil trespass suit against Local 23 after the General Counsel had issued an unfair labor practice complaint on July 25, 1986. The Board explained that its rule, as stated in *Loehmann's Plaza*, 305 N.L.R.B. 663 (1991), is that once the General Counsel issues a complaint "alleging the unlawful exclusion of employees or union representatives from an employer's property, any state court lawsuit

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[6] In agreement with the ALJ, the Board observed that, both before and during the time that Local 23 sought to picket in front of the Hempfield store, petitioner "allowed other organizations unlimited access to its property for sales and solicitations." Pet. App. 40a. The Board also noted that petitioner had allowed the Steelworkers to utilize its facility for union organizing purposes. *Id.* at 40a-41a n.5.

concerning the question is preempted by the Board's proceedings and the continued pursuit of such a lawsuit violates Section 8(a)(1)." Pet. App. 42a.

The Board also agreed with the ALJ that, in considering whether Local 23 had attained majority status among the Hempfield employees (for purposes of determining whether a *Gissel* bargaining order should issue), the 11 employees who worked at both the Greensburg and Hempfield stores should, under all of the circumstances, be excluded from the Hempfield bargaining unit. The Board observed that those 11 employees spent the majority of their time working at the Greensburg store, and remained under the primary supervision of their Greensburg supervisors when working at the Hempfield store; moreover, they were members of the Greensburg bargaining unit and were expressly covered by the collective bargaining agreement in effect between petitioner and the Steelworkers. Pet. App. 44a.

3. The court of appeals affirmed the Board's unfair labor practice findings and enforced its bargaining order. Pet. App. 1a-36a. The court agreed with the Board that petitioner had discriminatorily denied employee supporters of Local 23 access to its property in violation of Section 8(a)(1). Pet. App. 32a. The court observed that "six of the twelve pickets who began their protest on May 23 were unquestionably 'employees' under the Act," and it concluded that the Board was "clearly correct" in treating their picketing as subject to the requirement that the employer's access rules "not discriminate against the union by allowing other distribution." *Id.* at 30a, 31a. The court of appeals noted that petitioner's discriminatory behavior was "particularly egregious," since petitioner had invited at least three Steelworkers representatives inside the store to recruit employees and to distribute authorization cards and contracts, while at the

same time denying employees access to property outside of the store. *Id.* at 31a.

The court of appeals also agreed with the Board that petitioner violated Section 8(a)(1) by maintaining its trespass action in state court after the issuance of the General Counsel's unfair labor practice complaint. Pet. App. 36a. The court of appeals upheld the Board's rule in *Loehmann's Plaza*, namely, that an employer's state-court trespass action is preempted when the Board's General Counsel has filed a complaint, thus indicating that the conduct challenged by the employer is arguably protected by the Act and affording a forum before the Board for resolution of the legality of the trespass under federal labor law. Pet. App. 33a-36a. The court rejected petitioner's contention that, under *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986), the General Counsel's issuance of a complaint does not establish that the disputed conduct is "arguably protected" by the Act. Pet. App. 35a. In light of the investigation that the General Counsel conducts and the requirement that a complaint issue only if a charge appears to have merit, the court of appeals held that the Board reasonably holds that the issuance of a complaint establishes that the underlying conduct is arguably protected for preemption purposes. *Id.* at 36a.

Finally, the court of appeals upheld the Board's issuance of a *Gissel* bargaining order. In so holding, the court of appeals sustained the Board's finding that Local 23 had attained majority status in the Hempfield bargaining unit. The court rejected petitioner's claim that, for the purpose of determining whether majority status existed, the Board was required to include the 11 employees who worked at both the Greensburg and Hempfield stores in the Hempfield bargaining unit. Pet. App. 19a. The court agreed with the Board that those employees

were primarily associated with the Greensburg facility and that all 11 were already represented by the Steelworkers. *Id.* at 18a-19a.

ARGUMENT

1. Petitioner contends (Pet. 12-18) that the Board's rule in *Loehmann's Plaza*, 305 N.L.R.B. 663 (1991), conflicts with this Court's decisions in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983); *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); and *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986). There is no merit to that contention.

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959), this Court established that "[w]hen an activity is arguably subject to [Section] 7 * * * of the Act, the States * * * must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The Board in *Loehmann's Plaza* applied that principle by holding that preemption of state-court jurisdiction over trespass disputes involving picketing or handbilling occurs when the Board's General Counsel "issues [a complaint] * * * concerning the same activity." 305 N.L.R.B. at 671. The Board explained that "when the General Counsel issues a complaint, he has made a determination, pursuant to his 'final authority' under Section 3(d) of the Act [29 U.S.C. 153(d)] * * * that the union picketing or handbilling is arguably protected by the Act." *Id.* at 670. Pursuit or maintenance of a trespass action after the General Counsel's issuance of a complaint violates Section 8(a)(1) of the Act, because it seeks to enjoin or punish arguably protected activity. *Id.* at 671. Accordingly, the party that filed the trespass suit may be in violation of Section

8(a)(1) unless it seeks to stay the state-court proceeding, and to vacate any injunction that the state court may have issued, within seven days of the issuance of the General Counsel's complaint. *Ibid.*

Petitioner errs in suggesting that the Board's rule conflicts with this Court's cases. In *Bill Johnson's Restaurants*, the Court affirmed the Board's authority to enjoin, as an unfair labor practice under Section 8(a)(1) of the Act, a lawsuit that was "filed with [a] retaliatory intent," provided that the lawsuit has no "reasonable basis." 461 U.S. at 749. The Court emphasized, however, that "what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation," and it added that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption." *Id.* at 737 n.5. Accordingly, if a lawsuit is one over which the state courts lack jurisdiction because of *Garmon* preemption, the standard set forth in *Bill Johnson's* does not require the contrary result from the one reached in this case; the Board may enjoin the suit without regard to the nature of the litigant's motivation for initiating it, or the sufficiency of the basis supporting it.

In *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, the Court held that the Board's jurisdiction does not preempt a state court trespass action if the union does not file an unfair labor practice charge with the Board, for otherwise the employer would be left with no forum in which to adjudicate the issue of whether the union had a federal right to remain on the property. 436 U.S. at 200-208. The Court did not settle, however, the time at which preemption is triggered if a

union does file an unfair labor practice charge.[7] The *Loehmann's Plaza* rule, by establishing the General Counsel's issuance of a complaint as the event that triggers preemption of state-court jurisdiction over trespass suits, is consistent with *Sears*. The General Counsel's filing of a complaint occurs *after* the submission of a charge, and, by invoking the Board's jurisdiction, it provides a federal forum for resolution of the Act's application to the alleged trespass.

In *International Longshoremen's Ass'n* v. *Davis*, the Court stated that "[i]f the word 'arguably' [protected by the Act] is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor." 476 U.S. at 395. Petitioner contends (Pet. 17-18) that the General Counsel's filing of a complaint constitutes a "mere allegation" of a violation and therefore does not meet the standard articulated in *Davis*. The General Counsel's decision to file a complaint, however, follows an investigation of the charges filed by a private party and reflects the conclusion "that the charges have merit." *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 119 (1987). Those procedural requirements ensure that the basis for filing a complaint is not merely a private party's claim that the Board should assert jurisdiction. Against that background, the court of appeals correctly concluded that

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[7] In a concurrence, Justice Blackmun suggested that preemption should be found upon the filing of a charge. 436 U.S. at 209 (Blackmun, J., concurring). In response to that suggestion, Justice Powell filed a concurrence indicating disagreement with that view. *Id.* at 212-213 (Powell, J., concurring). The Court, however, did not address the issue. Petitioner acknowledges this, noting (Pet. 16) that "[t]he present case presents the situation discussed but not decided in *Sears Roebuck*."

when the General Counsel has decided to issue a complaint, the Board properly deems the underlying conduct to be "arguably" protected by the Act.[8] Pet. App. 36a.

Petitioner contends (Pet. 17-18) that, to avoid any issue regarding whether the Board's *Loehmann's Plaza* rule deprives it of its "constitutional right of access to the courts," the Act should be construed to prohibit the Board's rule. Instead, petitioner proposes to construe the Act to require the General Counsel "to present evidence for a court to determine whether the union's conduct is 'arguably protected' by the Act, or to proceed to a Board hearing on the complaint and seek a cease and desist order or other appropriate relief if the allegations are decided in its favor." Pet. 18.

The Board's approach, however, does not "raise serious constitutional problems," regarding petitioner's right of access to the courts, and there is no reason to "construe the statute to avoid such problems." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Under settled preemption principles, when there is an available forum before the Board (subject, of course, to judicial review) for the resolution of federal rights, a

[8] Petitioner suggests (Pet. 15, 17-18) that *Davis* requires a "neutral third party" to make the determination whether the conduct in issue is "arguably protected" by Section 7 and implies that the "third party" must be a court. Nothing in *Davis*, however, requires that the party making the determination be a court rather than the Board's General Counsel. Although *Davis* itself involved a union that had not filed a charge with the Board, but instead was seeking to persuade a court that the tort suit filed against it by a discharged employee was preempted, the General Counsel is, if anything, better situated to make the determination of arguable protection, because of his familiarity with governing federal labor law principles.

state court has no authority to entertain a suit to enjoin conduct that is "arguably" protected by the Act. *Garmon*, 359 U.S. at 245; *Sears*, 436 U.S. at 200-207. It follows that a litigant has no constitutional right to invoke the state processes that are preempted. Applying that principle as the Board has done in *Loehmann's Plaza* does not impair the constitutional right of access to the courts recognized in *Bill Johnson's*, 461 U.S. at 741, because the Court expressly noted in that case that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption." *Id.* at 737 n.5.

2. Petitioner contends (Pet. 18-23) that the Board erred in finding that petitioner discriminatorily refused to allow the picketers access to its property, in violation of Section 8(a)(1). Petitioner's challenge to the Board's finding, however, raises at most a fact-bound issue that does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, petitioner's contention is without merit.

Petitioner does not dispute that, as the Board held here, "an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution." Pet. App. 40a (quoting *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)); see also *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847 (1992) (reiterating non-discrimination principle of *Babcock*). The court of appeals applied that principle in affirming the Board's finding of anti-union discrimination by petitioner. As the Board noted, both before and during the time that petitioner refused to allow employee supporters of Local 23 to picket and handbill in front of the store, it allowed other organizations unlimited access to its property for sales and solicitations, and petitioner permitted the Steelworkers to utilize its facility for orga-

nizing purposes. Pet. App. 40a-41a; 31a-32a. Under those circumstances, the court of appeals correctly concluded that petitioner's "discriminatory behavior was particularly egregious." *Id.* at 31a.

Petitioner argues (Pet. 21) that its actions amounted to "legitimate time, place, and manner restrictions on the conduct at issue." That argument is without merit. Although petitioner initially permitted two picketers access to a limited portion of the parking lot (Pet. 21; Pet. App. 109a), it did not allow them access to the sidewalk in front of the store, an area to which it allowed other organizations unlimited access. Pet. App. 40a-41a. Moreover, petitioner later threatened picketers attempting to enter the parking lot with arrest, and summoned law enforcement officials to the facility. *Id.* at 41a-42a. These facts belie petitioner's contention (Pet. 21) that it was "concerned not about access per se, but the scope of that access." Petitioner's aim was to deny all access to its property to the employees who were picketing and handbilling in support of Local 23, and, as the Board found, petitioner's denial of that access discriminated against protected activity.[9]

3. Contrary to petitioner's contention (Pet. 24-29), the Board's exclusion of the 11 "dual function" employees

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[9] There is no merit to petitioner's suggestion (Pet. 23) that "the effect of the rulings below would be to require [p]etitioner to passively stand by in the face of trespass and mass picketing aimed at its customers that causes disruption to its business." As the Board held, an employer may impose valid restrictions upon access to its property so long as it enforces those restrictions in a non-discriminatory manner. Pet. App. 40a. Moreover, the ALJ found that "it was not demonstrated on this record that the pickets and handbillers acted in an obstructive manner or otherwise conducted themselves in any way but a peaceful manner." *Id.* at 176a.

from the Hempfield bargaining unit was reasonable and presents no issue warranting review by the Court.

In the midst of Local 23's organizing campaign, petitioner imported some workers from its Greensburg store to perform the same jobs at the Hempfield store—nine on a part-time, and two on a temporary, basis. The ALJ excluded these 11 employees from the Hempfield bargaining unit on the ground that they did not share a sufficient "community of interest" with the employees in that unit. Pet. App. 189a-191a. The Board affirmed that decision, explaining that the 11 employees "remained under the primary supervision of their Greensburg store supervisors and spent the majority of their working hours at the Greensburg store," and further that they were "in the Greensburg unit the Steelworkers represent and they are expressly covered by the existing collective-bargaining agreement between the [petitioner] and the Steelworkers." *Id.* at 44a. The court of appeals agreed with the Board that, on the facts presented, the 11 employees' "primary community of interest was with the Greensburg unit," and that, as they were represented by the Steelworkers, it would be "incongruous for them to be represented simultaneously by [Local 23]." *Id.* at 18a-19a.[10]

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[10] The court of appeals observed that, if these employees were placed in the Hempfield unit, it would be unclear whether "the Steelworkers or Local 23 represent[s] them in disputes over vacation time and insurance, not to mention over work assignments and transfer policy." Pet. App. 19a. The court added that, in such a situation, "[t]he employer would constantly face the threat of breaking the law by bargaining with the wrong representative," and the employees "would have to join two unions, pay dues twice, attend two sets of meetings, and somehow split their allegiance." *Ibid.* (quoting *Bentson Contracting Co.* v. *NLRB*, 941 F.2d 1262, 1266 (D.C. Cir. 1991)).

There is no merit to petitioner's contention (Pet. 24) that the Board's decision is "unsupported by a clearly defined analysis and * * * cannot be squared with the Board's 'well-established precedent.'" In *Berea Publishing Co.*, 140 N.L.R.B. 516 (1963), the Board refused to draw a "distinction between the part time employee, who may not work for more than one employer, and the employee who performs dual functions for the same employer," and also rejected a strict rule excluding any dual function employee who did not spend more than 50 percent of his or her time working in the unit. Neither *Berea* nor the other cases cited by petitioner (Pet. 25), however, involved a situation where, as here, the employees sought to be included in a second bargaining unit were already covered by a collective bargaining agreement with another union in the first bargaining unit in which the employees worked. Where that circumstance occurs, the Board, as here, has excluded the dual function employee from the second bargaining unit. See *Otasco, Inc.*, 278 N.L.R.B. 376 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DANIEL SILVERMAN
Acting General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

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